DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 92 CV 7223, Courtroom 19

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARTINA NAVRATILOVA, BRET TANBERG, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN,AND THE CITY COUNCIL OF ASPEN,

Plaintiffs,

v.

ROY ROMER, as Governor of the State of Colorado, GALE A. NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,

Defendants.

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Plaintiffs,

v.

ROY ROMER, as Governor of the State of Colorado, GALE A. NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,

Defendants.

Pursuant to C.R.C.P. 12(b)(5) and 121, § 1-15.1, Defendants Roy Romer, Governor of the State of Colorado, and Gale A. Norton, Attorney General of the State of Colorado, submit the following brief in support of their motion to dismiss the above-captioned action.

The Defendants are, of course, mindful of this Court's January 15, 1993 ruling. However, this case will be subject to intense appellate review, and the Plaintiffs' claims for relief might not ultimately depend on that ruling alone. Consequently, it is in the public interest to expeditiously resolve the remaining claims. To this end, as well as that of permitting the Court reconsider its prior ruling in light of additional briefing and argument, the

Defendants brief all issues presented in this case.

INTRODUCTION

In March 1992, the requisite number of qualified voters submitted to the Secretary of State a petition to place before the electorate a proposal to add a new section 30 to article II of the Colorado Constitution.[1] On November 3, 1992, the proposal, which was submitted to the voters as "Amendment 2," passed by a margin of 811,479 to 707,525 (53.4% to 46.6%). Amended Complaint at ¶¶ 1, 2. Amendment 2 provides:

> NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN, OR BISEXUAL ORIENTATION. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have any claim of minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

On November 12, 1992, the present action was instituted to have Amendment 2 declared unconstitutional on its face, and to enjoin its enforcement.

It is imperative to the public welfare that the issues in this case be resolved in an expeditious manner. To that end, Defendants

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[1]The Revisor of Statutes and the Office of Legislative Legal Services have renumbered this provision as § 30b for "ease of location." Colorado Revised Statutes, "Voter Approved Changes" at 3 (Special Supp. 1992).

have moved to dismiss the case, believing that this Court can determine all issues without need of any development of facts. Accepting, as we must for purposes of a motion to dismiss, the truth of the Plaintiffs' factual allegations, Plaintiffs still cannot succeed in this action as a matter of law.

Some of the Plaintiffs lack standing to assert any challenge to the amendment, while others only lack standing to assert certain types of challenges to the amendment. In any event, the Plaintiffs have the burden of persuading this Court beyond a reasonable doubt that Amendment 2 is susceptible of no possible constitutional interpretation or application.[2] The Plaintiffs cannot meet this high burden, in light of this Court's obligation to presume the amendment's constitutionality,[3] and to further construe it in such a manner as to avoid possible constitutional infirmities.[4]

Amendment 2 is not subject to attack on state constitutional grounds, since, being a later and more specific provision of the state constitution, it would supersede other provisions in the event of an irreconcilable conflict. Amendment 2 is also not

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[2]People v. Ford, 773 P.2d 1059, 1062 (Colo. 1989).

[3]Id. Cf. People v. Stevens, 761 P.2d 768, 771 (Colo. 1988) (even a provision "that fails to set precise standards . . . may be given a constitutional interpretation that accomplishes the purposes for which [it] was enacted.")

[4]People in the Matter of R.M.D., 829 P.2d 852, 853 (Colo. 1992). Accord, People v. Rosburg, 805 P.2d 432, 439 (Colo. 1991) ("the court has a duty to construe the statute in such a way that it is not void for vagueness when a reasonable and practicable construction can be given to its language"); Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1974)("a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state court . . . .")

subject to attack on federal constitutional grounds, since it leaves intact all rights conferred on homosexual or bisexual individuals under federal law.[5] The amendment neither affirmatively authorizes, encourages, nor establishes discrimination based upon sexual orientation, nor bars homosexuals and bisexuals from having discrimination suits adjudicated in state court. Amendment 2 simply limits the grounds upon which relief may be granted in state court to those cognizable under federal law.

THE MEANING OF AMENDMENT 2

Amendment 2: (1) prohibits the State or any of its branches, departments, or political subdivisions; (2) from enacting, adopting, or enforcing any statute, regulation, ordinance or policy; (3) recognizing a claim (and the concomitant benefits) of minority status, quota preferences, protected status, or discrimination; (4) premised on homosexual or bisexual orientation, conduct, practices, or relationships.

Amendment 2's prohibition on the enactment or adoption of state or local laws or policies according "minority status," "quota preferences," and "protected status," premised on homosexual or bisexual "orientation, conduct, practices or relationships" is readily understandable. The terms "minority status," "quota preferences," and "protected status," are commonly used in the

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[5]While Amendment 2 is cast in terms of "homosexual, lesbian or bisexual orientation," etc., this brief will discuss the issue in terms of only "homosexuality" and "bisexuality," since lesbianism is a form of homosexuality.

federal civil rights context to refer to those classes of individuals for whom special consideration, treatment, or protection is given.[6] And, the phrase "orientation, conduct, practices or relationships" is easily understood as referring to inclinations, acts, or romantic or passionate attachments.[7]

The real question, of course, is the extent to which state and local governments are prohibited from "enforcing" "any" law or policy which would entitle those of homosexual or bisexual orientation from raising a "claim of discrimination." The Plaintiffs eschew the reasonable and fair constitutional interpretation ascribed to Amendment 2 by the Defendants, in favor of a parade of horribles having no foundation in fact. It is absurd to suggest, as Plaintiffs do, that Amendment 2 leaves homosexuals and bisexuals wholly defenseless against those who would discriminate against them, or prohibits the state judiciary from adjudicating "claims of discrimination" which could otherwise have been brought

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[6]E.g., Salas v. Southwest Texas Junior College District, 964 F.2d 1542, 1549 (5th Cir. 1992)(word "minority" used in civil rights cases to denote a racial or social group, not a numerical percentage); Penthouse International, Ltd. v. Meese, 939 F.2d 1011, 1017 (D.C. Cir. 1991)("minority status"); H.K. Porter Co., Inc. v. Metropolitan Dade County, 975 F.2d 762, 766 (11th Cir. 1992)(use of "quotas" to alleviate effects of past discrimination); Ortega v. Safeway Stores, Inc., 943 F.2d 1230, 1236 (10th Cir. 1991)("protected status").

[7]"[O]rientation" is synonymous with "preference," see Opinion of the Justices to the Senate, 390 Mass. 1201, 458 N.E.2d 1192, 1194 (1984)("sexual preference" is not vague, because it is synonymous with "sexual orientation"); "conduct" and "practices," refer, respectively, to "mode of action" and "customs," Black's Law Dictionary 295, 1172 (6th ed. 1990); and "relationships" refers to "the relation[s] connecting or binding participants in . . . relationship[s] . . . romantic or passionate attachment[s]," Webster's Ninth New College Dictionary 994.

by those individuals under federal law.

Where the intended extent of a constitutional inhibition is uncertain, the limit of the purpose marks the limit of the rule, Lancaster v. Board of Comm'rs of Jefferson County, 115 Colo. 261, 265, 171 P.2d 987, 989 (1946). In determining the purpose of the amendment, the state of things existing when the amendment was adopted should be looked at, cf. Krutka v. Spinuzzi, 153 Colo. 115, 123, 384 P.2d 928, 933 (1963)(original constitution), and the object to be accomplished and the mischief to be avoided as a result of the amendment should be considered. People v. Y.D.M., 197 Colo. 403, 407, 593 P.2d 1356, 1359 (1979). In this respect, our state legislative council's analysis of the amendment provides important insight into the electorate's understanding of the amendment when it passed. Carrera Place, Ltd. v. Arapahoe County Bd. of Equalization, 761 P.2d 197, 203 (Colo. 1988).[8]

Viewed under these principles, the meaning and reach of Amendment 2 is clear. At the time the amendment was proposed (as well as currently), federal case and statutory law identified several groups or classes of individuals as appropriate for "special protection" against discrimination. Generally speaking, individuals are protected under the Fourteenth Amendment's Equal Protection Clause only from arbitrary governmental discrimination, and not at all as to private discrimination. The United States Supreme Court has, however, identified a very few number of classes

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[8]For the convenience of the Court, the Legislative Council's analysis of Amendment 2 has been attached to this brief.

of individuals which need heightened protection from possible governmental discrimination,[9] and Congress has enacted legislation protecting these same classes -- as well as a few more -- from public and private discrimination.[10] Homosexual or bisexual orientation has never been identified by the federal appellate courts or Congress as a basis for providing any special treatment beyond that guaranteed to most classes of individuals under the Equal Protection Clause of the Fourteenth Amendment.

This was not true in Colorado, however. At the time Amendment 2 was proposed, the General Assembly had enacted a statute prohibiting health insurance companies from determining insurability based on one's sexual orientation; the Governor had issued an executive order prohibiting job discrimination for state classified employees based on sexual orientation; at least two state colleges had policies prohibiting discrimination based on sexual orientation; three home rule cities (Denver, Boulder, and Aspen) had ordinances prohibiting discrimination based on sexual orientation in jobs, housing, and public accommodations; and the Colorado Civil Rights Commission had voted to recommend that the General Assembly

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[9]Loving v. Virginia, 388 U.S. 1, 11 (1967)(racial status, suspect class); Korematsu v. United States, 323 U.S. 214, 216 (1944)(national ancestry and ethnic origin, suspect class); Graham v. Richardson, 403 U.S. 365, 372 (1971)(alienage, suspect class); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982) (gender, quasi-suspect class); and Lalli v. Lalli, 439 U.S. 259, 265 (1978) (illegitimacy, quasi-suspect class).

[10]E.g., 5 U.S.C. § 5550a (religious practices); 20 U.S.C. § 1681 (sex); 29 U.S.C. §§ 206 (sex), 621 (age), 701 (handicapped); 42 U.S.C. §§ 1981 (race), 1982 (age), 2000d (race, color, national origin), 2000e (race, sex, religion, national origin).

extend the State's civil rights act to ban discrimination based upon sexual orientation. Legislative Council of the Colorado General Assembly, An Analysis of 1992 Ballot Proposals (Research Publ. No. 369, 1992) 14-15. These "sexual orientation" anti-discrimination provisions were obviously meant to protect homosexuals and bisexuals, since heterosexuals had not been subjected to any significant amount or type of private or public discrimination.

As Amendment 2's legislative history makes clear, its backers were concerned with only two things: 1) nullifying the effect of existing state and local laws or policies which prohibited discrimination based on homosexual or bisexual orientation; and 2) ensuring that state and local authorities could not adopt laws or policies which would have this effect. An Analysis of 1992 Ballot Proposals at 16-17.[11] Properly analyzed, the guiding intent behind Amendment 2 was not to deprive homosexuals or bisexuals of any constitutionally guaranteed rights, but to remove any state-based grounds for putting such individuals in a more favorable position vis-a-vis other citizens than would be required under federal law. Simply put, the intent was to realign the rights of the citizenry of this State with those provided by federal law and generally

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[11]Amendment 2 was not understood as intended to drive homosexuals or bisexuals from society. Where appropriate, homosexuals and bisexuals would have recourse to tort laws, Legislative Council of the Colorado General Assembly, An Analysis of 1992 Ballot Proposals (Research Publ. No. 369, 1992) 16, and neither the Amendment's language nor legislative history purport to make inapplicable to homosexuals or bisexuals the general protections of property, contract, employment, or criminal law.

recognized throughout the rest of the country.[12]

Having this in mind, and recognizing the constitutional supremacy problem created when a state court cannot, contrary to congressional intent, entertain a federal cause of action, e.g. Howlett by and through Howlett v. Rose, 496 U.S. 356, 369-71 (1990), the amendment prohibits only the enforcement of state or locally based claims of discrimination, and not the enforcement of federally based claims of discrimination. This interpretation, which is also consistent with the principle of ejusdem generis, see Colorado Common Cause v. Meyer, 758 P.2d 153, 162 (Colo. 1988), accomplishes the underlying purpose of the amendment. See, e.g. Parrish v. Lamm, 758 P.2d at 1369 (court accomplishes legislative purpose, and avoids constitutional issue, by construing word "determines" to mean "reasonably determines").[13]

I. THE PLAINTIFF CITIES, CITY COUNCIL MEMBERS, AND SCHOOL DISTRICT LACK STANDING TO BRING THIS ACTION

Plaintiffs, the City and County of Denver (Denver), the City of Boulder (Boulder), the City of Aspen (Aspen), the City Council

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[12]Nationwide, only Six States, eight other governors, 110 cities and counties in 25 States, and 65 universities had adopted anti-discrimination laws or policies with respect to sexual orientation. An Analysis on 1992 Ballot Proposals at 15.

[13]The Plaintiffs complain that this construction is "strained" and contrary to "plain language." However, it is the Plaintiffs who ignore the "plain language" of the amendment's title and certain phrases indicating that its purpose was only to prohibit special rights. At most there is a possible ambiguity in the language, which must be resolved in favor of the Defendants, after resorting to the appropriate legislative history.

of Aspen (the Council), and the Boulder Valley School District, RE-2 (School District) have brought this action along with the individual named Plaintiffs for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983, § 13-51-101, C.R.S. (1987), and Rules 57 and 65, C.R.C.P., seeking to have Amendment 2 declared unconstitutional, its enforcement enjoined, and their own ordinances and policies granting special status to homosexuals and bisexuals given effect. The gravamen of their Amended Complaint is that Amendment 2 violates federal constitutional rights and interferes with their own state constitutional authority to enact local legislation or policies. Aside from failing to state any factual basis entitling them to relief, the Plaintiff cities, city council members, and school district have failed to allege any legally protected interest which is, or may be affected by, Amendment 2. Thus, they lack standing to participate in this action.

The Colorado Supreme Court has held that a party has standing to litigate an issue if that party has alleged (1) an injury (or threatened injury) in fact (2) to a legally protected interest. Wimberly v. Ettenberg, 194 Colo. 163, 168, 570 P.2d 535, 539 (1977).[14] In this case, the governmental Plaintiffs have stated no legally protected interest which is, or may be, adversely affected

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[14]See also Baker v. Carr, 369 U.S. 186, 204 (1962)(standing is a judicially-created test to determine whether or not litigant has a sufficient stake in the outcome of controversy, so as to assure concrete adverseness which sharpens the presentation of issues upon which court so largely depends for illumination of difficult questions); and Flast v. Cohen, 392 U.S. 83, 101 (1968)(question of standing focuses on whether the litigant is proper party to request adjudication of particular issue and not whether issue itself is justiciable).

by Amendment 2.

The Plaintiff cities and city council members lack standing under 42 U.S.C. § 1983 to challenge the validity of Amendment 2. 42 U.S.C. § 1983 was enacted to afford individuals a federal cause of action for deprivation of federally protected constitutional rights by state officials acting under color of state law. Monroe v. Pape, 365 U.S. 167, 180 (1961)(overruled in part on other grounds, Monell v. Department of Social Services, 436 U.S. 650, 701 (1978)). Section 1983 was designed to protect individuals against state action and does not afford protection to political subdivisions of the State from actions taken by the sovereign.

An action against state officers in their official capacity is a suit against the State itself. Game and Fish Comm'n v. Feast, 157 Colo. 303, 308, 402 P.2d 169, 172 (1965).[15] Political subdivisions created by the State (or its people) have no privileges or immunities under the federal constitution which they may invoke in opposition to the will of their creator. Board of County Comm'rs v. City and County of Denver, 150 Colo. 198, 205, 372 P.2d 152, 156 (1962). Therefore, for purposes of § 1983, Plaintiffs Denver, Boulder, Aspen, and the City Council are not persons possessed of federally protected constitutional rights.

The Colorado Supreme Court decision in Board of County Comm'rs, supra, tracks the long line of federal cases holding that public entities which are political subdivisions of the State do not possess constitutional rights in the same sense as private

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[15]Cf. Will v. Michigan State Police, 491 U.S. 58 (1989).

individuals, since such entities are creatures of the state and possess no rights, privileges or immunities independent of those conferred upon them by the State.[16] Although municipalities and other political subdivisions may be persons for purposes of liability under 42 U.S.C. § 1983, see Monell, supra, they are not persons possessing federal constitutional rights for purposes of bringing an action. Housing Auth., 952 F.2d at 1192. Cf. Board of County Comm'rs v. City and County of Denver, supra (Fourteenth Amendment claim in annexation action). "[T]he equal protection clause of the Fourteenth Amendment was not designed to protect state instrumentalities against state action, much less against the constitutional right of the people 'to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness . . . .'" Board of County Comm'rs v. City and County of Denver, 150 Colo. at 205, 372 P.2d at 156 (quoting Colo. Const. art. II, § 2). Since Plaintiffs Denver, Boulder, Aspen, and the Council have no federal constitutional rights, they have no legally protected interests allowing them to sue under 42 U.S.C. § 1983.[17]

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[16]E.g., City of Trenton v. New Jersey, 262 U.S. 182, 187 (1923); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 692 (1819); Housing Auth. v. City of Ponca City, 952 F.2d 1183, 1188-92 (10th Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 1945 (1992); City of Moore v. Atchison, Topeka & Santa Fe R.R., 699 F.2d 507, 511 (10th Cir. 1983).

[17]The Plaintiffs' reliance upon Missouri v. Jenkins, 495 U.S. 33 (1990) and Washington v. Seattle School Dist. No. 1, is also misplaced. In neither Jenkins or Seattle School Dist. was the validity of a state constitutional provision at stake, nor was the relationship of the local entity to the State the same as it is in Colorado, vís-a-vís the right to challenge the validity of a state

The governmental Plaintiffs further lack standing to challenge the validity of Amendment 2 under the Declaratory Judgments Law and C.R.C.P. 57 and 65. Pursuant to § 13-51-101 and C.R.C.P. 57, a person[18] whose rights or status may be affected by a statute is entitled to have any question of their rights under that statute determined provided a substantial controversy of sufficient immediacy exists between adverse parties. Silverstein v. Sisters of Charity, 38 Colo. App. 286, 291, 559 P.2d 716, 720 (1976).[19] The central question here is again whether counties or municipalities are "persons," but whether they have a threatened harm to a legally protected interest. The Colorado Supreme Court has long held that, except where a specific statute grants the right, political subdivisions of the State and their officers lack standing to challenge the constitutionality of state statutes directing the performance of their duties. Board of County Comm'rs v. Fifty-First General Assembly, 198 Colo. 302, 304, 599 P.2d 887, 899 (1979). The Court there stated that while political subdivisions of the State may qualify as persons for purposes of the

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constitutional amendment. As noted, political subdivisions in Colorado (home rule or otherwise) have no standing, as a matter of law, to challenge the will of the people as expressed in the state constitution.

[18]Section § 13-51-103 includes municipal corporations as "persons" for purposes of declaratory relief.

[19]Similarly, with injunctive relief pursuant to C.R.C.P. 65, a court can enjoin the enforcement of a statute if the moving party can make a clear showing that injunctive relief is necessary to protect existing legitimate property rights or fundamental constitutional rights. Rathke v. MacFarlane, 648 P.2d 648 (Colo. 1982). Rule 65 does not authorize enjoining the enforcement of a state constitutional provision.

Uniform Declaratory Judgments Law, and may in certain instances bring suit, the law and rules do not confer upon them standing for purposes of challenging the constitutionality of a law directing the perform-ance of their duties. 198 Colo. at 305 n.1, 599 P.2d at 889 n.1.[20]

Plaintiffs have alleged in their Amended Complaint, however, that they are proper parties because Amendment 2 conflicts with their constitutionally-granted authority to legislate on matters of local concern. Certainly, home rule counties and cities are vested with the power of self-government as to matters of local concern and are not inferior to the General Assembly regarding such matters. Colo. Const. art. XX; Denver Urban Renewal Auth. v. Byrne, 618 P.2d 1374, 1381 (Colo. 1984). Colo. Const. art. XX, § 6, adopted by the voters in 1912, authorized the granting of "home rule" powers to municipalities opting to operate under its provisions. Although Article XX created home rule supremacy in all purely local matters, Board of County Comm'rs v. City of Thornton, 629 P.2d 605, 609 (Colo. 1981), it did not create supremacy with respect to matters of statewide (or even mixed state and local) concern;[21] home rule cities and counties remain subordinate to the General Assembly in such matters. City and County of Denver v.

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[20]See also Mesa Verde Co. v. Montezuma County Bd. of Equalization, 831 P.2d 482, 484 (Colo. 1992).

[21]For example, the types of local matters committed to the control of home rule cities are: municipal officers and employees, courts, elections, bonds and other obligations, park and water districts, assessment of property, and the assessment of fines and penalties. Colo. Const. art. XX, § 1.

State, 788 P.2d 764, 767 (Colo. 1990). See also National Advertising Co. v. Department of Highways, 751 P.2d 632, 635 (Colo. 1988); City & County of Denver v. Colorado River Water Conservation Dist., 696 P.2d 730, 740 (Colo. 1985). Home rule cities are even more subordinate in their relationship to the Colorado Constitution, as enacted by the people.

The power of the people to determine their own government in this State is plenary, subject only to the Constitution of the United States. Art. II, § 1 of the Colorado Constitution provides that all political power is vested in and derived from the people. Section 2 of Article II reserves to the people the power to alter (and if they deem necessary to abolish altogether) the state government. One aspect of the people's supreme power is the initiative, which is reserved to them by themselves to propose laws by petition and to enact or reject them at the polls independent of the General Assembly. Colorado Project-Common Cause v. Anderson, 178 Colo. 1, 4, 495 P.2d 220, 221 (1977).

Because the people retain the absolute right to alter their form of government, Plaintiffs' reliance on Article XX is without merit. Our Supreme Court has held that even in fields of local and municipal matters the authority granted to home rule cities by Article XX may be taken away by subsequent amendments to the constitution. As a result, what was once a matter of purely local, or mixed local and statewide, concern may by constitutional amendment become a matter solely of statewide concern. City and County of Denver v. Sweet, 138 Colo. 41, 49, 329 P.2d 441, 445

(1958).[22] According to the Colorado Supreme Court, home rule cities "think of themselves as being like medieval city-states with plenary powers which bar the state from any form of supervision or control of matters which later events show to be either matters of constitutional or state-wide concern." 138 Colo. at 49, 329 P.2d at 444. However, "our federal system does not envisage as a part thereof city-states. . . . This court has long recognized that even in fields of local and municipal matters the authority granted to home rule cities by Article XX may be taken away by subsequent amendments to the constitution." Id. at 49, 329 P.2d at 445. Accord, City and County of Denver v. Duffy Storage, 168 Colo. 91, 96, 450 P.2d 339, 342 (1969).

The Plaintiff School District also does not have standing. At the outset, the Plaintiffs completely misapprehend the nature of article IX, § 15. It does not grant any power to the school districts, but only to the local school boards. Cf. Denver Ass'n for Retarded Citizens v. School Dist. No. 1, 188 Colo. 310, 318, 535 P.2d 200, 204 (1975)(school districts, like all political subdivisions, lack standing to challenge the constitutionality of state statutes directing their performance). The district does not

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[22]That the voters not only understood, but intended to, abrogate home rule powers is clear from the legislative history. The Legislative Council's analysis (of which 204,000 copies were distributed statewide), expressly provides that the amendment was intended to nullify the ordinances in question, and would prevent adoption of such measures in the future. An Analysis of 1992 Ballot Proposals at 13, 14, 16. Moreover, the debate regarding the proper scope of home rule powers was featured in the analysis' discussion of arguments "for" and "against" Amendment 2. Id. at 16-17.

have standing to assert the rights of the Board, and accordingly should be dismissed.

Moreover, even if the District is somehow found to have standing, it lacks the power to bring suit challenging the federal constitutionality of a state constitutional provision. Cf. Colo. Att'y Gen. Op. (Aug. 29, 1986)(school districts lack power to challenge state or federal constitutionality of Public School Finance Act of 1973). The District has only those powers explicitly conferred by the Colorado Constitution and statutes. Union High School Dist. v. Paul, 105 Colo. 93, 99, 95 P.2d 5, 8 (1939); Jacobs v. Freemon RE-1 School Dist., 697 P.2d 414, 415 (Colo. App. 1984).

Since neither the Colorado Constitution nor the statutes enumerating the powers and duties of local school districts and local boards,[23] explicitly confer a power to sue the State or its officials, the District must be regarded as lacking the power. While it is true that school districts have the power to "sue and be sued," § 22-32-101, C.R.S. (1988), it is clear that suit may only be brought in conjunction with a specifically granted power. See Board of County Comm'nrs v. Love, 172 Colo. 121, 125, 470 P.2d 861, 863 (1970); Adams County Bd. of County Comm'rs v. Union Pacific Railroad Co., 34 Colo. App. 156, 525 P.2d 1202 (1974). Since, as explained above, it lacks the specific power to bring the suit, the District lacks standing and accordingly must be dismissed

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[23] E.g., §§ 22-32-101, 103, 109, 110, C.R.S. (1988).

from this suit.[24]

In this case it obvious that the governmental Plaintiffs have no standing to challenge the enforcement of Amendment 2 by seeking declaratory or injunctive relief. Amendment 2 is a supreme directive to the State and all of its political subdivisions; the Plaintiffs, as political subdivisions of the State and their officers, have no standing to challenge a state constitutional amendment, which is inherently a matter of statewide concern. See, e.g., Board of County Comm'rs v. Fifty-First General Assembly, 198 Colo. at 305, 599 P.2d at 888-89 (political subdivisions of the State are creatures of the State established for the convenience of state government, and their public officials are to follow the law).

II. AS A MATTER OF LAW, ALL OF THE PLAINTIFFS' STATE CONSTITUTIONAL LAW CLAIMS MUST BE DISMISSED

Plaintiffs allege several types of violations of state constitutional law principles. They assert violations of state home rule and school district authority, limits on the initiative, and Bill of Rights principles; that is, they claim that a provision of the state constitution violates the state constitution. However, as part of the state constitution, Amendment 2 is equal in

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[24]Furthermore, any agreement to use public funds to pursue this suit would be null and void. Colorado Div. of Employment v. Industrial Comm'n, 665 P.2d 631 (Colo. App. 1983). Indeed, the Board members authorizing the suit or other expenditure of public funds connected therewith may also incur personal liability. School Dist. No. 98 of Adams County v. Pomponi, 79 Colo. 658, 661, 247 P. 1056, 1057 (1926).

stature to the home rule, initiative, and Bill of Rights provisions, and, being later in time and more specific, would control any inconsistencies in their application. See generally, Colorado Common Cause v. Bledsoe, 810 P.2d 201, 207 (Colo. 1991).[25] It is patently nonsensical to speak of the constitution as violating itself.

A. Amendment 2 Does Not Violate the Home Rule Provisions of the Colorado Constitution

Amendment 2 and home rule authority do not and cannot conflict, and no usurpation of power has occurred. As discussed earlier, the people have the power to declare matters to be of statewide concern, and thereby remove them from the authority of home rule cities. Sweet, supra. And, as the Court held in People ex rel. Carlson v. City Council of the City and County of Denver, 60 Colo. 370, 380, 153 P. 690, 693 (1915), it is not necessary that a constitutional amendment contain an express provision indicating it is specifically modifying Article XX.

Here, there can be no question about the statewide concern addressed by Amendment 2. Even aside from the fact that the exercise of the people's will, through the initiative process, inherently affects a matter of statewide concern, this Court must recognize that questions of civil rights and discrimination cannot be relegated to a status of purely local concern. Congress and the

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[25]See also In re Interrogatories by General Assembly, House Joint Resolution 1108, Second Regular Session, Forty-Seventh General Assembly, 171 Colo. 200, 205, 467 P.2d 56, 59 (1970); People ex rel. Carlson v. City Council of the City and County of Denver, 60 Colo. 370, 380, 153 P. 690, 693 (1915).

States have often decided whether, as a matter of policy, the number of groups in need of protection should be expanded.

Moreover, the Plaintiffs argue that Colo. Const. art. XX (enacted in 1902) concerning home rule authority, operates as an implied limitation on Colo. Const. art. V (enacted in 1876) concerning the power to initiate amendments to the Constitution. Amended Complaint, ¶ 60. Initially, such a claim must be premised upon an inherent conflict between Articles XX and V.

The test for the existence of a conflict between two constitutional provisions is whether one authorizes what the other forbids or forbids what the other authorizes. In Re Interrogatories Propounded by the Senate Concerning House Bill 1078, 189 Colo. 1, 7, 536 P.2d 308, 313 (1975). Nothing in the art. V power of initiative forbids what the art. XX home rule power permits. Furthermore, the Constitution must be liberally construed so as not to unduly limit or curtail the initiative rights of the people. In Re Second Initiated Constitutional Amendment Respecting Rights of Public to Uninterrupted Service by Public Employees of 1980, 200 Colo. 141, 146, 613 P.2d 867, 870 (1980). Even so, this case does not involve a conflict between two constitutional provisions, but rather, an alleged conflict between an amendment adopted under art. V and ordinances enacted under city charters adopted pursuant to art. XX. The Plaintiffs' arguments misapprehend the issue before the Court.

The Plaintiffs maintain that because Colo. Const. art. XX became law after Colo. Const. art. V, art. XX limits art. V.

However, the Colorado Supreme Court has held that:

> This court has long recognized that even in fields of local and municipal matters, the authority granted to home rule cities by Article XX may be taken away by subsequent amendments to the Constitution. . . . We recognize that the people have not surrendered their right to amend the constitution in any manner in which they see fit, and such amendments are always valid unless repugnant to the Constitution of the United States.

City and County of Denver v. Sweet, 138 Colo. at 49, 329 P.2d at 445 (citations omitted). Under the Plaintiffs' reasoning, any constitutional provision adopted after 1902 which limits the power of home rule cities would be void. Such an interpretation of arts. V and XX is absurd and should be rejected by this Court. Mahood v. City and County of Denver, 118 Colo. 338, 340, 195 P.2d 379, 380 (1948).

B. Amendment 2 Does Not Violate the Constitutional Powers of Local School Districts

The Plaintiff Boulder Valley School District then asserts that, on its face, Amendment 2 violates Article IX, § 15 of the Colorado Constitution by nullifying certain of its policies with respect to sexual orientation.[26] In so doing, they assume that (1) Article IX, § 15 guarantees local control of all aspects of the schools; (2) local school districts have the power to adopt

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[26]It must be noted that as a governmental entity, the School District must always have a rational basis for any action it takes with respect to its students. See pp. 74-80, infra. In this context, it is far from clear that Amendment 2 invalidates the School District's policy.

policies with respect to the sexual orientation of students; and (3) anything which conflicts with local control violates the Colorado Constitution. The Plaintiffs are incorrect as to each assumption.

First, the Plaintiffs completely misapprehend the nature of article IX, § 15. It does not guarantee local control over all aspects of the school district. Rather, article IX, § 15 simply mandates that the local school board shall have control over instruction.[27] Clearly, policies related to the sexual orientation of students are not instructional. In non-instructional areas such as policy making with respect to students, the school districts have only those powers specifically delegated by statute and, more importantly, clearly are subject to state control. E.g., Union High School Dist. v. Paul, 105 Colo. 93, 95 P.2d 5 (1939); Jacobs v. Freemon RE-1 School Dist., 697 P.2d 414 (Colo. App. 1984). Indeed, school districts are "merely the instruments of state government, chosen for the purpose of effectuating its policy in relation to schools." Hazlet v. Gaunt, 126 Colo. 385, 392, 250 P.2d 188, 191 (1952).

Second, since the Constitution does not give local districts the power to control non-instructional activities, the power to make policies with respect to the sexual orientation of students, if it exists at all, must come from those statutory provisions, §§

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[27]Indeed, the local board does not have total control over instruction. For example, school districts must teach United States and Colorado history, respect for the flag, the United States Constitution, and the effect and use of certain substances. See Sections 22-1-104, 106, 108, 110, C.R.S. (1988).

22-32-109 and 110, C.R.S. (1988) which describe the specific duties and powers of school districts. Even assuming that these statutes confer a power to make policy with respect to sexual orientation of students, they are of course subject to the Constitution.

Most obviously, even if the policies at issue are somehow found to be instructional, Amendment 2 does not violate article IX, § 15. As noted earlier, if there is a conflict between two constitutional provisions, that which is more specific and later in time (Amendment 2) would control. Accordingly, the Court must dismiss the Plaintiffs' groundless claim of a violation of article IX, § 15.

C. Amendment 2 Does Not Violate the Limits on the Initiative

Plaintiffs next allege that by placing certain legislation beyond the reach of the General Assembly, Amendment 2 violates Colo. Const. art. V, § 1(4). That provision establishes certain procedures for voting on measures initiated by or referred to the people. Its text concludes: "This section shall not be construed to deprive the general assembly of the power to enact any measure."[28]

Plaintiffs' claim was foreclosed almost 80 years ago in People v. Prevost, 55 Colo. 199, 211-12, 134 P. 129, 133 (1913)(provision means only that "the general assembly may amend or repeal any initiated act that is adopted by the people at the polls.")(citing

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[28]Here, any "injury" occasioned as a result of any possible conflict between Amendment 2 and art. V would be for the General Assembly, not the Plaintiffs, to assert.

In re Senate Resolution, 54 Colo. 262, 130 P. 333 (1913)(emphasis supplied). See also People ex rel. Zimmerman v. Herder, 122 Colo. 456, 223 P.2d 197 (1950). The term "measures" found in art. V, subsection 1(4) obviously does not contemplate making constitutional amendments,[29] or contravening any part of the state constitution:

> The General Assembly has plenary legislative powers, conferred by the people in their constitution. These powers, however, are subject to express or implied restraints reflected in the Constitution itself. The legislature cannot enact a law contrary to those constitutional restraints . . . . Where the language of the constitution is plain and its meaning clear, that language must be declared and enforced as written.

Colorado Ass'n of Public Employees v. Lamm, 677 P.2d 1350, 1353 (Colo. 1984)(citations omitted). See also Yenter v. Baker, 126 Colo. 232, 237, 248 P.2d 311, 314 (1952)(the purpose of a self-executing constitutional amendment is to put it beyond the power of the legislature to nullify; all legislation must be subordinate to the constitution and in furtherance of its purpose.)

Undeterred, the Plaintiffs next claim that Amendment 2 constitutes a "revision" rather than an "amendment" to the Colorado Constitution, and therefore may be accomplished only through a constitutional convention. Although the distinction between a constitutional "revision" and a constitutional "amendment" has been

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[29]The General Assembly is only empowered to propose amendments to the constitution. See Colo. Const. art. XIX, § 2(1).

discussed in a number of California cases,[30] it is a theory that has not been recognized beyond the borders of that State. In fact, Defendants have been unable to locate another jurisdiction which even recognizes this theory. This is not surprising, given that the California Constitution specifically provides that although "The electors may amend the Constitution by initiative,"[31] a "revision" may be accomplished only by convening a constitutional convention and obtaining popular ratification,[32] or by legislative submission to the voters.[33]

In contrast, the Colorado Constitution makes no such distinction between "amendments" and "revisions." Even if this Court were to find that this concept was somehow implicitly relevant to the fundamental structure of Colorado government, it is apparent that the people have already determined the appropriate limits on the amendment power.[34]

In fact, the initiative process is itself one of the most

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[30]E.g., Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 22 Cal.3d 208, 149 Cal. Rptr. 239, 583 P.2d 1281 (Cal. 1978); Raven v. Deukmejian, 52 Cal.3d 336, 276 Cal. Rptr. 326, 801 P.2d 1077 (Cal. 1990); and Legislature of State of California v. Eu, 54 Cal.3d 492, 286 Cal. Rptr. 283, 816 P.2d 1309 (Cal. 1991).

[31]Cal. Const. art. XVIII, § 3.

[32]Cal. Const. art. XVIII, §§ 2, 4.

[33]Cal. Const. art. XVIII, §§ 1, 4.

[34]Multiple proposed constitutional amendments submitted during a single general election must be voted on separately, and that each General Assembly "shall have no power to propose amendments to more than six articles of this constitution." Colo. Const. art. XIX, § 2.

important checks on other constitutional powers, and it present role should not be disturbed. Even in California, where the constitution explicitly distinguishes between amendments and revisions, the courts have been quite hesitant to place additional limits on the initiative power. See, e.g, Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 22 Cal.3d 208, 149 Cal. Rptr. 239, 583 P.2d 1281 (1978).

Typically, the California courts focus upon whether the amendment alters the fundamental relationship and distribution of power between the three branches of government. See State of California v. Eu, 54 Cal.3d 492, 286 Cal. Rptr. 283, 816 P.2d 1309 (1991). They have been reluctant to find that a constitutional "revision" has occurred. Eu, 54 Cal. 3d at 508, 286 Cal. Rptr. at 292,816 P.2d at 1318 (combined effect of term and budget limitations was not a "revision" because "the relationship between the three governmental branches, and their respective powers, remain untouched."); Amador, 36 on. App. 97, 101,583 P.2d at 581 ("an enactment which purported to vest all judicial power in the Legislature would amount to a revision without regard either to the length or complexity of the measure or the number of existing articles or sections affected by such change"). See also Brosnahan v. Brown, 32 Cal. 3d 236, 289,651 P.2d 274, 289,186 Cal. Rptr. 30, 62 (1982).[35] Since Amendment 2 does not fundamentally change the

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[35]Even Raven v. Deukmejian, 801 P.2d 1077 (Cal. 1990) is inapposite. There, Proposition 115 attempted to realign California's interpretation of criminal procedural rights to a level consistent with U.S. Supreme Court decisions. The court held that Proposition 115 was an improper "revision" because it "would vest

distribution of power among the branches of Colorado government, it would not violate the "revision" doctrine even if it were recognized in Colorado, which it is not.[36]

D. Amendment 2 Does Not Violate the Colorado Bill of Rights

Finally, the Plaintiffs claim that Amendment 2 violates the Colorado Bill of Rights, of which it is now a part.[37] Even if the Colorado Supreme Court had previously used some of these provisions to provide Colorado citizens more rights than required by federal law, as noted earlier such standards could not be applied to invalidate or limit the effect of Amendment 2. Simply put, "[t]he people can do any thing by constitutional amendment unless

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all judicial interpretive power, as to fundamental criminal defense rights, in the United States Supreme Court." 801 P.2d at 1087 (emphasis in original). The court attempted to distinguish a long line of prior California decisions sustaining limitations of particular rights or powers by explaining that Proposition 115 involved a "broad attack on state court authority to exercise independent judgement in construing a wide spectrum of important rights under the state Constitution." 801 P.2d at 1089.

[36]"If, as petitioners predict, Proposition 140 ultimately produces grave, undesirable consequences to our governmental plan, the Legislature or the people are empowered to propose a new constitutional amendment to correct the situation." State of California v. Eu, 54 Cal. 3d at 511, 286 Cal. Rptr. at 293, 816 P.2d at 1320 (citation omitted).

[37]Plaintiffs specifically rely on provisions relating to the freedoms of association and expression (Colo. Const. art. II, § 10), the prohibition of an establishment of religion (Colo. Const. art. II, § 4), the right to access the courts (Colo. Const. art. II, § 6), and the right to equal protection of the law (Colo. Const. art. II § 25). Plaintiffs also argue that the right to petition is independently protected by Colo. Const. art. II, § 10. Amended Complaint at ¶ 47. However, Colo. Const. art. II, § 10 concerns the freedom of speech and of the press, does not reference the right to petition, and has not been held to encompass that right. Compare Colo. Const. art. II, § 24.

prohibited by the terms of the Constitution of the United States." Cooper Motors, Inc. v. Board of County Comm'rs, 131 Colo. 78, 84, 279 P.2d 685, 688 (1955).[38] Thus, all claims that Amendment 2 violates other provisions of the state constitution must be dismissed.[39]

III. AMENDMENT 2 DOES NOT VIOLATE THE FEDERAL CONSTITUTIONAL GUARANTY OF A REPUBLICAN FORM OF GOVERNMENT

Plaintiffs apparently claim that Colorado's initiative process, by permitting the people to amend their Constitution directly through a statewide vote, violates the guaranty of a republican form of government of the U.S. Constitution.[40] Such an argument is, at best, specious. For almost a century and a half claims under the Clause have been held to be nonjusticiable "political questions," to be resolved by Congress and the President. Luther v. Borden, 48 U.S. (7 How.) 1, 29 (1849). Although some courts have occasionally entertained Guaranty Clause claims,

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[38]Claims that Amendment 2 effectively voids the Colorado Bill of Rights as to homosexuals and bisexuals have no basis in the text or history of the amendment, and emerge solely from the extraordinarily broad construction sought by the Plaintiffs.

[39]Inasmuch as Amendment 2 does not violate Article XX of the Colorado Constitution, or (as will be subsequently demonstrated) any provision of the U.S. Constitution, Plaintiffs' Eleventh Claim for Relief, regarding limitations on amendments to the state constitution, must necessarily fail.

[40]The Guaranty Clause provides that "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. Const. art. IV, § 4.

and even more rarely ruled upon the merits of such claims,[41] the U.S. Supreme Court has historically refused to do so.[42] The reasons for this are clear. First, recognizing such claims would foster legal challenges to the validity of the state government itself, whenever a citizen had a dispute with that government.[43] Second, it would become incumbent upon the courts to disregard the existence and enactments of that State.[44] Third, anarchy would ensue unless the courts took it upon themselves to construct new state governments,[45] which would necessarily intrude upon powers expressly committed to the federal government under Article I of the U.S. Constitution.[46] "[T]he repugnancy of those contentions to the letter and spirit of [art. IV, § 4] is so conclusively established as to cause the matter to be absolutely foreclosed." Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118,

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[41]E.g., Van Sickle v. Shanahan, 212 Kan. 426, 437, 511 P.2d 223, 233 (1973)(attempting to distinguish Luther v. Borden, 48 U.S. (7 How.) 1, 29 (1849) and Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118 (1912)).

[42]See generally New York v. United States, 112 S. Ct. 2408, 2432-2433 (1992).

[43]Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118, 141 (1912)).

[44]Id. at 142.

[45]Cf. Id. at 148 (quoting Luther v. Borden, 48 U.S. (7 How.) 1, 29, 43 (1849)("If the judicial power extends so far, the guarantee contained in the constitution of the United States is a guarantee of anarchy, and not of order.")

[46]Id. It is not surprising that John Adams confessed he "never understood" what the Clause meant and "believe[d] no man ever did or ever will." W. Wieck, The Guarantee Clause of the U.S. Constitution 72 (1972) (quoting Letter from John Adams to Mercy Warren (July 20, 1807)).

143 (1912)(emphasis supplied)).

Directly on point is the U.S. Supreme Court's decision in Pacific States Telephone where the sole question presented was whether "the creation by a State of the power to legislate by the initiative and referendum causes the prior lawful state government to be bereft of its lawful character" under the Guaranty Clause. 223 U.S. at 137. The Court found that the claims "are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope and powers conferred upon Congress, and not therefore within the reach of judicial power . . . ." Id. at 151. The Court therefore dismissed the case outright "for want of jurisdiction." Id.

Even if claims under the Guaranty Clause were judicially cognizable, Plaintiffs would not have standing to assert such a claim. The Clause contemplates that "the United States," not private parties, shall guarantee republican government. "[W]hen the senators and representatives of a State are admitted to the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority." Pacific States Telephone, 223 U.S. at 147.[47]

Even so, the Guaranty Clause was intended to confer upon the

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[47]See also Coyle v. Smith, 221 U.S. 559, 567-68 (1911)(citing Minor v. Happersett, 88 U.S. (21 Wall.) 162, 174 (1875)("It may imply the duty of such new state to provide itself with such government, and impose upon Congress the duty of seeing that such form is not changed to one anti-republican . . . .")(emphasis supplied)).

federal government the "authority to defend the system against aristocratic or monarchial innovations," The Federalist, No. 43 (J. Madison), rather than prohibit popular governance.[48] Indeed, "[a]s the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, it seems strictly consonant to the republican theory to recur to the same original authority . . . whenever it may be necessary to enlarge, diminish, or new-model the powers of government . . . ." Mountain States Legal Foundation v. Denver School Dist. No. 1, 459 F. Supp. 357, 361 (1978)(quoting The Federalist, No. 49 (J. Madison).[49] In that case, Judge Matsch further noted that abridgement of the initiative process "would seem so contrary to the root philosophy of a republican form of government as might cause this Court to resort to the guaranty clause of Article IV, Section 4 of the United States Constitution." Id. (citing Kohler v. Tugwell, 292 F. Supp. 978 (E.D. La. 1968) (Wisdom, J.,

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[48]"The opinion of the Federalist has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties, in the questions to which that instrument has given birth. Its intrinsic merit entitles it to high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 418 (1821).

[49]Thomas Jefferson maintained that "absolute acquiescence in the decisions of the majority" is "the vital principle of republics." First Inaugural Address by President Thomas Jefferson (Mar. 4, 1801), reprinted in 1 The Founders' Constitution, 140-41 (P. Kurland & R. Lerner eds. 1987). See also The Federalist, No. 22 (A. Hamilton)(The "fundamental maxim of republican government ... requires that the sense of the majority should prevail.")

concurring), aff'd, 393 U.S. 531 (1969)).[50]

In fact, the U.S. Supreme Court has found that, "[i]n establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature." Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 672 (1976). Far from being repugnant to the Guaranty Clause, the initiative is "a fundamental right at the very core of our republican form of government." McKee v. City of Louisville, 200 Colo. 525, 530, 616 P.2d 969, 972 (1980)(quoted in Grant v. Meyer, 828 F.2d 1446, 1455 n.14 (10th Cir. 1987), aff'd, Meyer v. Grant, 486 U.S. 414 (1988).[51]

In the alternative, the Plaintiffs claim that the initiative process violates § 4 of the Enabling Act, which is an act of Congress.[52] However, an enabling act has no force and effect after a state is admitted to the Union, Coyle v. Smith, supra. Further, nothing in Colorado's Enabling Act confers a private right of

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[50]Accord, City & County of Denver v. Sweet, 138 Colo. 41, 49, 329 P.2d 441, 445 (1958)("We recognize that the people have not surrendered their right to amend the constitution in any manner they see fit, and such amendments are always valid unless repugnant to the Constitution of the United States.")(citing City and County of Denver v. People, 103 Colo. 565, 88 P.2d 89 (1939)). Cf., Colo. Const. art. II, § 2.

[51]Indeed, the U.S. Supreme Court has recognized that "the distinguishing feature" of a republican form of government "is the right of the people to choose their own officers for governmental administration, and pass their own laws." In re Duncan, 139 U.S. 449, 461 (1891). See also Baker v. Carr, 369 U.S. at 222 n.48. Compare Colo. Const. art. II, § 1 ("all government, of right, originates from the people").

[52]"[T]he constitution shall be republican in form . . ..." Act of Mar. 3, 1875, ch. 139, 18 Stat. 474, § 4.

action with respect to any of its provisions. While the U.S. Supreme Court has recognized that some federal statutes contain an implied right of action, e.g., Cannon v. University of Chicago, 441 U.S. 677, 688-96 (1979), recent case law makes it clear that now the Supreme Court will not recognize a private right of action unless there is evidence that Congress intended to create one. See Touche Ross & Co. v. Redington, 442 U.S. 560, 571-73 (1979); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-18 (1979). See also, Karahilos v. National Federation of Federal Employees, 489 U.S. 527, 536 (1989). Since there is no evidence that Congress intended to create a private right of action, one does not exist.

Finally, it must be observed that Plaintiffs' arguments regarding both the Guaranty Clause and the Enabling Act necessarily call into question the validity of each and every amendment to the Colorado Constitution since statehood which resulted from the initiative process. Pacific States Telephone, 223 U.S. at 141 ("the contention, if held to be sound, would necessarily affect the validity, not only of the particualr statute which is before us, but of every other statute passed in Oregon since the adoption of the initiative and referendum.") Such a result further underscores the infirmities inherent in Plaintiffs' position.

IV. THE MEANING OF AMENDMENT 2 IS SUFFICIENTLY CLEAR AND IS NOT UNCONSTITUTIONALLY VAGUE

Plaintiffs claim that Amendment 2 is impermissibly vague under

the Due Process Clause of the Fourteenth Amendment. In Plaintiffs' view, the failure to include in Amendment 2 definitions or limitations on its sweep renders it impermissibly imprecise and open to subjective, arbitrary, and viewpoint-based enforcement, particularly in areas affecting First Amendment freedoms. For several reasons, Plaintiffs' claims must fail.

First, the void-for-vagueness doctrine is actuated primarily by the imposition of sanctions upon affected persons. The policy underlying the doctrine is the fundamental unfairness of penalizing individuals who had no reason to believe their conduct was forbidden.[53] Here, there are no "sanctions" imposed upon "persons." Amendment 2 does not impose any direct obligations or disabilities upon private parties, including the individual named Plaintiffs; it simply limits certain kinds of governmental conduct, and the affected governmental entities are not "persons" entitled to the protections of the Due Process Clause. See, e.g., Board of County Comm'rs v. City and County of Denver, 150 Colo. at 304, 372 P.2d at 156.

Second, the void-for-vagueness doctrine is particularly inappropriate for gauging the validity of constitutional provisions, which, because of their very nature, are expected to have a fairly broad, rather than specific, meaning. For example, despite

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[53]See, e.g., Sellon v. City of Manitou Springs, 745 P.2d 229, 233 (Colo. 1987)(in order to succeed on a vagueness challenge, the provision must fail to provide fair notice of what conduct is prohibited, or fail to provide law enforcement authorities with sufficiently definite standards of nonarbitrary, nondiscriminatory enforcement of the law.").

all the questions which have arisen over the past century about what constitutes "religion," "a preference," of or for religion, or "the free exercise and enjoyment of religious profession and worship," no would suggest that the Religion Clauses of the Colorado Constitution, art. II, § 4, are facially invalid under the vagueness doctrine of the federal constitution. For that matter, the notion of due process, upon which the vagueness doctrine is founded, is itself "an elusive concept," whose "exact boundaries are undefinable, and its content varies according to specific factual contexts." Hernandez v. Cremer, 913 F.2d 230, 237 (5th Cir. 1990).

Finally, Amendment 2 would not, in any event, violate the vagueness doctrine of the Due Process Clause. Plaintiffs cannot argue that the amendment is impermissibly imprecise in all its possible applications, as they must whenever a challenged provision does not on its face implicate First Amendment rights. See Village of Hoffman, Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497-99 (1982). Even assuming there is any ambiguity which could be viewed as implicating First Amendment freedoms, Amendment 2 is nonetheless sufficiently precise to withstand a challenge premised upon the attending heightened scrutiny.[54] See generally

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[54]"The degree of vagueness the Constitution tolerates . . . depends in part on the nature of the enactment." Village of Hoffman, Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982). The Constitution demands greater clarity in criminal enactments and in enactments threatening to inhibit the exercise of constitutionally protected rights; it requires less clarity in civil enactments and economic regulations. Flipside, 455 U.S. at 498-99; Parrish v. Lamm, 758 P.2d 1356, 1366-67 (Colo. 1988); High Gear & Toke Shop, 689 P.2d 624, 631 (Colo. 1984).

United States v. Young, 864 F.2d 188, 194 (D.C. Cir. 1988). "The vagueness test 'is not an exercise in semantics to emasculate legislation; rather, it is a pragmatic test to ensure fairness.'" Parrish v. Lamm, 758 P.2d 1356, 1368 (Colo. 1988). Consequently, Plaintiffs' vagueness challenge must be dismissed.

V. AMENDMENT 2 DOES NOT VIOLATE THE FEDERAL CONSTITUTIONAL RIGHTS TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES OR TO OBTAIN ACCESS TO THE COURTS

The Plaintiffs lodge a number of related First Amendment claims. Specifically, they maintain that Amendment 2 violates the rights to petition, expression, and association, since it restricts the powers of local governments and the General Assembly to confer special status or rights on the basis of homosexual or bisexual orientation. However, there is no requirement that legislative, executive, and judicial bodies be allowed to act with respect to every conceivable viewpoint.

Both the United States and Colorado Constitutions contain numerous provisions which prevent government from acting on particular beliefs and none of these restrictions has ever been found to be a violation of the First Amendment rights of persons holding those particular beliefs. For example, the federal and state Equal Protection Clauses prevent state and local governments from acting on the belief that one race or one sex is superior to another. See U.S. Const. amend. XIV, § 1; Colo. Const. art. II, § 29. Yet, no one claims that these restrictions violate the First

Amendment rights of white supremacist groups. Similarly, there are provisions prohibiting federal, state, and local governments from acting on the belief that one religion is superior or that certain religious practices should be condemned. See U.S. Const. amend. I; Colo. Const. art. II, § 4. See also U.S. Const. art. VI, § 3. However, no one claims that these restrictions violate the First Amendment rights of those who regard their religion as the one true church or who regard the religious practices of others as heresy.

Plaintiffs claim that since Amendment 2 places special protections for homosexuals and bisexuals beyond the competency of governmental officials, it abridges their right to petition the government for a redress of grievances.[55] However, "neither the First Amendment nor elsewhere in the Constitution is there a provision guaranteeing that all petitions for the redress of grievances will meet with success." Canfora v. Olds, 562 F.2d 363, 364 (6th Cir. 1977).[56] The First Amendment "provides no guarantee that a speech will persuade or advocacy will be effective, nor does it 'impose any affirmative obligation on the government to listen or to respond . . . .'" Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463, 464-65 (1979). Accord, Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271, 288 (1984)("A person's right to speak is not infringed when government simply

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[55]"Congress shall make no law . . . abridging . . .the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I.

[56]Indeed, this case is before this Court precisely because the right to petition, possibly in its purest form, was invoked by the people, and the Plaintiffs were dissatisfied with the result.

ignores that person while listening to others.")

Moreover, "[w]hen government makes general policy, it is under no greater constitutional obligation to listen to any specially affected class than it is to listen to the public at large." Minnesota State Bd. for Community Colleges, 465 U.S. at 287. In fact, the Constitution does not grant to members of the public generally a right to be heard by public decision-making bodies. Id. at 283-84 (citing Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915)(opinion of Holmes, J., for the Court)). In fact, the Plaintiffs' attack on the initiative process stands the right to petition on its head:

> Citizens have the unquestioned right to petition their governments for redress of what they believe are grievances. One means of preserving this right is through the procedures of initiative, referendum and recall. Other constitutional rights conceivably can require interference with a referendum, but only in the most exceptional circumstances. The judicial branch of government properly hesitates to prevent citizens from voting on matters raised by an exercise of the constitutional right to petition the government. To do otherwise would be to enter a political thicket studded with constitutional thorns.

Diaz v. Board of County Comm'rs of Dade County, 502 F. Supp. 190, 193 (S.D. Fla. 1980)(citations omitted). Similarly, the Colorado Supreme Court has held that "the power of the initiative is to be liberally construed to allow the greatest possible exercise of this valuable right." City of Glendale v. Buchanan, 195 Colo. 267, 272, 578 P.2d 221, 224 (1978). Accord, McKee v. City of Louisville, 200

Colo. 525, 616 P.2d 969, 972 (1980).[57]

For the same reasons, Plaintiffs' claim that Amendment 2 unconstitutionally denies access to the courts is also without merit. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972)(quoting Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc, 365 U.S. 127, 138 (1961).[58] It is beyond dispute that state courts have the authority and responsibility to enforce federal claims properly brought before them. Howlett, 496 U.S. at 367 n.16 (citing Martin v. Hunter's Lessee, 1 Wheat. (14 U.S) 304, 340-342 (1816). However, Amendment 2 neither was intended to nor in fact does deny Colorado courts the power to adjudicate federally-based claims premised upon a plaintiff's sexual orientation. See pp. 30-31, supra. Consequently, the Plaintiffs' claims in this regard, including that relating to the Supremacy Clause of the U.S. Constitution, are wholly without merit.

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[57]See also Mountain States Legal Foundation v. Denver School Dist. No. 1, 459 F. Supp. 357, 361 (1978)("Do not the people themselves, as the grantors of the power of government, have the right to freely petition for what they believe is an improvement in the exercise of that power?")

[58]See also, N.A.A.C.P. v. Button, 371 U.S. 415, 429-30 (1963); Protect Our Mountain v. District Court, 677 P.2d 1361, 1365 (Colo. 1984). It also has been noted that the right to petition may be given less weight when adjudicatory bodies are sought to be petitioned, rather than state or federal legislatures. In re Airport Car Rental Antitrust Litigation, 474 F. Supp. 1072, 1087 (N.D. Cal. 1979).

VI. AMENDMENT 2 DOES NOT VIOLATE PLAINTIFFS' FEDERAL CONSTITUTIONAL RIGHT TO FREEDOM OF EXPRESSION

The Plaintiffs claim that, on its face, Amendment 2 violates their freedom of expression because it (1) excludes a particular idea or belief regarding sexual orientation from being acted on through normal legislative, executive, and judicial processes; (2) has the purpose and effect of limiting individual and collective advocacy of political, social, and economic change on their behalf; and (3) requires individuals to adopt a state-sponsored viewpoint of homosexuality and bisexuality. The Plaintiffs believe that the First Amendment guarantees that all expression of any viewpoint will be free from risk of retaliation, reprisal, or other consequences from those private parties who might disagree. In effect, the Plaintiffs assert that the First Amendment protects their viewpoints from both governmental and private censorship and from both private and public consequences. These contentions are clearly incorrect.

Initially, as discussed earlier, there are several state and federal constitutional provisions which limit the ability of government to act on beliefs about race, sex, or religion. Yet, these restrictions have never been held to violate the freedom of expression of persons holding a contrary viewpoint. Cf. Hansen v. Guyette, 636 F. Supp. 902, 906 (D. Minn. 1986).[59] Clearly,

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[59]Police Dep't of the City of Chicago v. Mosley, 408 U.S. 92, 96 (1972) does not hold that the State cannot discriminate against a particular idea. Mosley involved an ordinance restricting picketing based upon whether it was labor or non-labor-related, and stands for the proposition that government may not discriminate on

government can make value choices without interfering with the First Amendment rights of those who disagree with the government's choice. The First Amendment does not guarantee that government will not adopt a viewpoint different from one's own; it only protects the right to voice disagreement with the government.

Amendment 2 does not limit the ability of the Plaintiffs to advocate on behalf of homosexuals or bisexuals. The Plaintiffs are still perfectly free to agree or disagree with Amendment 2 and to work for or against its repeal; the Plaintiffs' expressive rights will be neither greater nor less than they were previously. Indeed, "[a] person's right to speak is not infringed when government simply ignores that person while listening to others." Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. at 288.

Moreover, while Amendment 2 may make it more difficult for the Plaintiffs to achieve state or local governmental adoption of their viewpoint in as much as the Plaintiffs will have to win the passage of a constitutional amendment, this greater burden does not constitute a infringement on their right of expression. It is clear that "the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action . . . ."

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the basis of the speech's content. It does not mean that government cannot choose one value or idea over another. Indeed, every governmental action represents a value choice in some area.

Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 470 (1982).[60] This is exactly what has happened with Amendment 2, and indeed, what happens every time the political process is restructured. Further, as Seattle School Dist. made clear, in the absence of animosity toward a suspect class, the political process can be restructured to impose such greater obstacles. Cf. Lyng v. International Union, United Auto, Aerospace, & Agric. Implement Workers of America, UAW, 485 U.S. 360, 368-69 (1988)(government has no obligation to minimize any resulting hardship from the exercise of right of expressive association).[61]

In addition, it is equally clear that while a state or local government can grant more protection than that required by the U.S. Constitution, that additional protection can be freely withdrawn without committing a federal constitutional violation. Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527, 538-39 (1982)(upholding a state constitutional amendment prohibiting state courts from ordering forced busing for desegregation absent a constitutional violation). When government withdraws that additional protection,

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[60]The exception to this rule is when special obstacles are placed in the path of a suspect class. Cf. Hunter v. Erickson, 393 U.S. 385 (1969)(striking down ordinance which required all measures relating to ending racial discrimination in housing be approved in a general election). See also Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982). Inasmuch as homosexuals and bisexuals are not a suspect class, see pp. 72-74, infra, this exception would not apply.

[61]Indeed, when the people approved term limitations for state legislators in 1990, they fundamentally altered the structure of their government. Colo. Const. art. IV, § 2; art. V, § 3. Certainly, it made it more difficult for supporters of incumbents to advance their political agenda. However, this does not in any way render term limits to be constitutionally suspect.

it does not violate the First Amendment rights of those who disagree with the change in policy. In the present case, Denver, Aspen, and Boulder, like the state courts in California, chose to provide protections above and beyond those required by the United States Constitution. However, the people of Colorado, like the people of California, chose to amend their Constitution and rescind the protections. Just as the California action did not violate the federal Constitution, the action of the citizens of Colorado does not violate the federal Constitution. In effect, neither the First Amendment nor any other constitutional provision requires that government make the process of bringing change as easy as possible.[62]

Nor does Amendment 2 force the Plaintiffs or anyone else to adopt a particular viewpoint about homosexuality or bisexuality. Cf. Gay Student Services v. Texas A & M Univ., 737 F.2d 1317, 1329 (5th Cir. 1984), cert. denied, 471 U.S. 1001 (1985)("at the heart of the freedom guaranteed by the First Amendment is the freedom to choose -- even if that choice does not accord with the state's view as to which choice is superior"). Although the Plaintiffs may assert that Amendment 2 will have some sort of chilling effect on

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[62]See also Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463, 464-65 (1979)(First Amendment "provides no guarantee that a speech will persuade or advocacy will be effective, nor does it 'impose any affirmative obligation on the government to listen or to respond'"); Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271, 288 (1984)("A person's right to speak is not infringed when government simply ignores that person while listening to others"); Canfora v. Olds, 562 F.2d 363, 364 (6th Cir. 1977)("neither the First Amendment nor elsewhere in the Constitution is there a provision guaranteeing that all petitions for the redress of grievances will meet with success").

their free speech rights, they have failed to allege exactly how Amendment 2 will result in government-sponsored threats, harassment, or reprisals to specific individuals. Humphreys, Hutcheson, and Moseley v. Donovan, 755 F.2d 1211, 1220 (6th Cir. 1985); Master Printers of America v. Donovan, 751 F.2d 700, 704 (4th Cir. 1984), cert. denied, 474 U.S. 818 (1985).[63]

Even if the Plaintiffs can somehow demonstrate that Amendment 2 has increased the risk of espousing certain viewpoints, increased risk of negative reaction from private parties does not constitute a violation of the First Amendment. See Student Government Ass'n v. Board of Trustees of the Univ. of Massachusetts, 868 F.2d 473, 479 (1st Cir. 1989)(government is under no obligation to remove barriers to expression that are not created by the government).[64] The First Amendment merely guarantees the right to express viewpoints free from governmental interference; it does not guarantee that the expression of those viewpoints will receive a positive response from either public or private actors or even that the message will be heard.[65]

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[63]See also Buckley v. Valeo, 424 U.S. 1, 74 (1976); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462-63 (1958).

[64]See also May v. Evansville Vanderburgh School Corp., 787 F.2d 1105, 1109 (7th Cir. 1986); R.C. Maxwell Co. v. Borough of New Hope, 735 F.2d 85, 87 (3d Cir. 1984)(First Amendment does not apply to private actions, only those of public parties). Cf. Hinman v. Lincoln Towing Services, Inc., 771 F.2d 189, 194 (6th Cir. 1985)(Constitution is a charter of negative liberties and does not impose any affirmative obligations to provide services or special protections).

[65]Moreover, the Plaintiffs appear to believe that the First Amendment's freedom of expression protects one's status as a homosexual or bisexual, the performance of homosexual or bisexual

Every day, thousands of Coloradans refrain from expressing viewpoints on a variety of subjects because of fears of various forms of retaliation from private parties. The First Amendment simply means that a viewpoint will not be censored or chilled by the government; it does not mean that there will be no consequences from private parties for the expression of viewpoints.[66] For example, when government prohibits racial, sexual, or religious discrimination, white supremacist groups might face increased risks for expressing their viewpoints. Yet, the courts do not regard this increased risk as a violation of the freedom of expression. Similarly, any increased risk to the Plaintiffs would not be regarded as a violation of the Plaintiffs' freedom of expression.

In addition, the Plaintiffs' reliance on cases where government has been precluded from compelling expression because of possible retaliation by private parties, such as N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449 (1958), is misguided. Unlike Patterson, where the State wished to compel a form of expression which would inevitably lead to the private retaliation

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acts, and the expression of viewpoints about homosexuality or bisexuality. This is incorrect. At most, the First Amendment protects the expression of viewpoints about homosexuality or bisexuality from governmental censorship. Neither the First Amendment nor any other constitutional provision protects homosexual or bisexual acts or one's status as a homosexual or bisexual. See Bowers v. Hardwick, 478 U.S. 1039 (1986).

[66]Although in some specific instances, government may be under some sort of obligation to protect demonstrators from potential harms such as mob violence, See Edwards v. South Carolina, 372 U.S. 229, 236-37 (1963), there is no general mandate for police protection from those who might disagree with the views being expressed. Sherrill by and through Wooden v. City of Longview, 683 F. Supp. 1108, 1112-13 (E.D. Tex. 1987).

against specific individuals, the present case involves neither a compulsion nor a prohibition on expression. Thus, even if there is an increased risk to the Plaintiffs because of Amendment 2, the risk is far more remote and the link to the State far more tenuous than the risk presented in Patterson and similar cases.

Furthermore, contrary to the assertions of the Plaintiffs, Amendment 2 does not remove the right of the Plaintiffs or anyone else to seek redress for private acts of retaliation against them. Just as a person who is beaten or harrassed because of their religious or political views can seek redress from their attacker in a civil or criminal prosecution, a person who is beaten or harassed because of his/her views on homosexuality and bisexuality can seek criminal or civil redress.

Finally, any reliance upon Merrick v. Board of Higher Education, 116 Or. App. 258, 841 P.2d 646 (1992) is misplaced. The issue here is solely whether Amendment 2 violates the First Amendment to the United States Constitution.[67] Merrick does not address that issue. In invalidating a statute because it inhibited expression regarding sexual orientation, the Oregon court in Merrick based its decision solely on an interpretation of its own state constitutional guarantee of freedom of expression. Because

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[67]Colorado's equivalent of the First Amendment, Colo. Const. art. II, § 10, could also normally be viewed as providing more protections than its federal counterpart. E.g. Bock v. Westminster Mall Co., 819 P.2d 55 (Colo. 1991). However, this is not the case here. A later enacted constitutional provision cannot violate an earlier enacted provision because "the people can do anything by constitutional amendment unless prohibited by the terms of the Constitution of the United States." Cooper Motors, Inc. v. Board of County Comm'rs, 131 Colo. 78, 84, 279 P.2d 685, 688 (1955).

Oregon's state constitution provides greater protection than the First Amendment,[68] the Merrick decision is not even persuasive authority for resolving the issues in this case.[69]

VII. AMENDMENT 2 DOES NOT VIOLATE PLAINTIFFS' FEDERAL CONSTITUTIONAL RIGHT OF FREEDOM OF ASSOCIATION

The Plaintiffs also appear to claim that, on its face, Amendment 2 violates their freedom of association. Amended Complaint at ¶¶ 39-42. The U.S. Supreme Court has recognized two distinct categories of the freedom of association: the First Amendment freedom of "expressive association" (which protects the ability to associate "for the purpose of engaging in protected speech or religious activities")[70] and a Fourteenth Amendment

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[68]Compare Merrick v. Board of Higher Education, 116 Or. App. 258, 841 P.2d 646 (1992), slip op. at 3, and State v. Moyle, 299 Or. 691, 702, 705 P.2d 740, 748 (1985)(expression is protected regardless of context; both political and non-political speech are protected equally), with Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)(speech can be proscribed where it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."). See also Board of Trustees, State Univ. of New York v. Fox, 492 U.S. 469, 476-78 (1989); Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328, 340 (1986)(both upholding restrictions on speech which advocated legal activity).

[69]Indeed, Oregon courts have adopted a unique practice of always resolving state constitutional claims before turning to the federal constitutional claims. See State v. Kennedy, 295 Or. 260, 666 P.2d 1316 (1983). Consequently, the state courts in Oregon have effectively abdicated their role as developers of federal law. Utter, Ensuring Principled Development of State Constitutional Law: Responsibilities for Attorneys and Courts, 1 Emerging Issues in State Const. Law 217, 223 (1988).

[70]Although similar, there is a fundamental difference between freedom of expression and freedom of expressive association. The former refers to actual expressive actions, while the latter refers

freedom of "intimate association" (which protects "against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships"). Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 544 (1987); Roberts v. United States Jaycees, 468 U.S. 609, 618-22 (1984). See also Trujillo v. Board of County Comm'rs of the County of Santa Fe, 768 F.2d 1186, 1188 (10th Cir. 1985). Although the Plaintiffs are unclear as to whether they are alleging a violation of expressive association, intimate association, or both, it is clear that the Plaintiffs have failed to state a claim for violation of either type.

If the Plaintiffs are alleging a violation of the freedom of expressive association, then they must maintain that Amendment 2 somehow inhibits their ability to form advocacy groups, or to otherwise associate for the purposes of expressing their views regarding homosexuality and bisexuality. See New York State Club Ass'n v. City of New York, 487 U.S. 1, 13 (1988)("ability and the opportunity to combine with others to advance one's views is a powerful practical means of insuring the perpetuation of freedoms . . . . ")[71] Yet, on its face, Amendment 2 does not affect "in any significant way" the ability of the Plaintiffs to form associations that will advocate their viewpoints. See id.; Rotary, 481 U.S. at 548. There is no portion of Amendment 2 which requires, either

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to associating together for the purpose of expression.

[71]As explained earlier, the Plaintiffs' freedom of expression is not violated by Amendment 2.

explicitly or implicitly, that the Plaintiffs or any other persons or groups "abandon or alter" their expressive activities or their presumed viewpoints. New York Club, 487 U.S. at 13; Rotary, 481 U.S. at 548.

Moreover, it would be absurd to suggest that Amendment 2 compels the State or its institutions to rvoke recognition of student or minority organizations which advocate homosexual and bisexual rights. There is nothing which compels the Plaintiffs or anyone else to adopt a particular viewpoint. In short, the Plaintiffs have the exact same expressive rights now as they had prior to the passage of Amendment 2. The only difference is that the advancement of some of their political objectives is more difficult.

Moreover, while the Plaintiffs may claim that the adoption of a position which is contrary to their viewpoint, will somehow chill their freedom of expressive association, such a claim, even if true, would not amount to a constitutional violation. The mere fact that government adopts a viewpoint contrary to the viewpoint of some of its citizens does not, by itself, constitute a violation. For example, both the state and federal governments have adopted viewpoints on the propriety of racial discrimination which are clearly contrary to those of white supremacist groups. Yet, this adoption of an anti-discrimination viewpoint does not mean that the expressive associational rights of white supremacist groups have in any way been abridged. Members of such groups are free to advocate their positions even though government has taken

an opposing view, and even though an overwhelming majority of society disagrees with these views. See Forsyth County v. Nationalist Movement, 112 S. Ct. 2395 (1992). Indeed, the government has no obligation to maximize the freedom of expressive association or to minimize any resulting hardship from the exercise of the right. Lyng, 485 U.S. at 368-69. Accordingly, the Plaintiffs have failed to state a claim for violation of their freedom of expressive association.

In the alternative, if the Plaintiffs are attempting to allege a violation of their Fourteenth Amendment freedom of intimate association, then they must maintain that Amendment 2 somehow hinders their ability to form those relationships which presuppose "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." Roberts, 468 U.S. at 619-20. See also Rotary, 481 U.S. at 545. Such relationships are "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." Roberts, 468 U.S. at 620.

On its face, Amendment 2 presents no legal barriers to the formation of these special relationships. Persons are not prohibited from entering into such relationships and Amendment 2 imposes no legal penalty for doing so. Cf. Bowers v. Hardwick, 478 U.S. 186 (1986)(upholding a Georgia statute criminalizing

sexual relations between persons of the same sex). While Amendment 2 might be construed as implicitly expressing disapproval of certain types of relationships, there is no obligation that the State express its encouragement or even its neutrality toward the development of particular relationships. Indeed, the state government frequently expresses its implicit or explicit approval of certain relationships through, among other things, its tax laws. Accordingly, unless it can be shown that the State has imposed an undue burden upon relationships, the freedom of intimate association is not implicated. Cf. Moore v. City of East Cleveland, 431 U.S. 494, 503-04 (1977)(living arrangements); Zablocki v. Redhail, 434 U.S. 374, 383-86 (1978)(marriage); Carey v. Population Services International, 431 U.S. 678, 684-86 (1977) (decision to have children); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925)(education of children).

Furthermore, to the extent that Amendment 2 conceivably could make persons less likely to enter into, or acknowledge, some types of relationships, such an effect would not constitute a violation of the Constitution. A mere adverse impact on the freedom of intimate association is not sufficient. A 42 U.S.C. § 1983 claim for violation of the freedom of intimate association must include "an allegation of intent to interfere with a particular relationship protected by the freedom of intimate association . . . ." Trujillo, 768 F.2d at 1190. See also, Morfin v. Albuquerque Public Schools, 906 F.2d 1434, 1440 (10th Cir. 1990); Apodaca v. Rio Arriba County Sheriff's Dep't, 905 F.2d 1445, 1448 (10th Cir.

1990). The Plaintiffs have made no allegation of an intent to interfere with any particular relationship. Rather, at most, the Plaintiffs have alleged some sort of adverse impact on the freedom of intimate association. Thus, as a matter of law, the Plaintiffs have failed to state a 42 U.S.C. § 1983 claim for a violation of their freedom of intimate association.

VIII. AMENDMENT 2 DOES NOT VIOLATE THE FEDERAL CONSTITUTION'S ESTABLISHMENT CLAUSE

The Plaintiffs allege that, on its face, Amendment 2 violates the federal Establishment Clause.[72] Amended Complaint at ¶¶ 39-42. The U.S. Supreme Court utilizes a three-part test to analyze the constitutionality of a policy or law challenged under the federal Establishment Clause. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). See also Lee v. Weisman, 112 S. Ct. 2649, 2655 (1992)(refusing to abandon the Lemon test).[73] To pass constitutional muster under the Lemon test:

> [f]irst, the [state constitutional provision] must have a secular legislative purpose; second its principal effect must be one that neither advances nor inhibits religion . . . ; finally, the [the state constitutional provision] must not foster an excessive government entanglement with religion.

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[72]"Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. amend. I.

[73]In determining if the Establishment Clause has been violated, the role of the court is not to construct a new jurisprudence but merely to apply the well-established principles of this area of the law. Stark v. St. Cloud State Univ., 604 F. Supp. 1555, 1559-60 (D. Minn. 1985), aff'd, 802 F.2d 1046 (8th Cir. 1986).

Lemon, 403 U.S. at 612-13.[74]

It is obvious that Amendment 2 passes all three prongs. First, since Amendment 2 has secular purposes of avoiding the dilution of existing civil rights programs by limiting the expansion of special protections, as well as accommodating competing First Amendment rights. It is clear that the actual purpose of Amendment 2 is not to endorse or disapprove of any religion. In order to determine if there is a secular purpose, a court looks at statute on its face, legislative history, or administrative interpretation. Edwards v. Aguillard, 482 U.S. 578, 594 (1987).[75] Because it is not intended to endorse or disapprove of any religion, and there is a clear secular purpose, the first prong of the Lemon test is satisfied.[76]

Second, it is clear that Amendment 2 does not have the primary effect of advancing or inhibiting religion. Plaintiffs apparently

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[74]See also Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 305 (1985); Committee for Public Educ. v. Regan, 444 U.S. 646, 653 (1980); Roemer v. Maryland Public Works Bd., 426 U.S. 736, 748 (1976).

[75]See also Wallace v. Jaffree, 472 U.S. 38, 56 (1985)(in determining if a secular purpose exists, it is appropriate to ask whether the actual purpose is to endorse or disapprove of a religion).

[76]Moreover, it is clear that if a statute is motivated by both secular and sectarian purposes, it does not violate the Establishment Clause. See International Ass'n of Machinist and Aerospace Workers, Lodge 751 v. Boeing Co., 833 F.2d 165, 167 (9th Cir. 1987), cert. denied, 485 U.S. 1014 (1985); Cammack v. Waihee, 673 F. Supp. 1524, 1531 (D. Haw. 1987), aff'd, 932 F.2d 765 (9th Cir. 1988). In addition, courts should defer to the State's assertion of a secular purpose. Cammack, 673 F. Supp. at 1531. See also Libin v. Town of Greenwich, 625 F. Supp. 393, 399 (D. Conn. 1985)(even if a law provides an "incidental" endorsement of religion, it can still pass constitutional muster.)

claim that since the policy expressed by Amendment 2 and some of its supporters may well have religious antecedents, its passage amounts to an "establishment of religion" in violation of the First Amendment. However, Plaintiffs must allege precisely which religious creed the people intended to, or in fact have, established through the passage of Amendment 2. Even among the varying Christian confessions, there was a wide range of responses, from strong support to neutrality to zealous opposition; many religious groups publicly opposed Amendment 2.

Although the traditional view of homosexuality and bisexuality in the United States has been founded in large part upon historic moral and religious tenets, the mere fact that Amendment 2 happens to coincide or harmonize with the tenets of some religion does not render it unconstitutional. Hernandez v. C.I.R., 490 U.S. 680, 696 2147 (1989). See also American Jewish Congress v. City of Chicago, 827 F.2d 120, 127 (7th Cir. 1987)(recognition and accommodation of religious sentiments is not the same as intentionally promoting a particular religious viewpoint). Nor is an indirect benefit to religion sufficient to make a law unconstitutional. Smith v. Board of School Comm'rs of Mobile County, 827 F.2d 684, 691 (11th Cir. 1987). For example, although Sunday closing laws coincide with the tenets of many religious groups, the U.S. Supreme Court has repeatedly upheld them:

> [T]he fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because cen-

> turies ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State.

McGowan v. Maryland, 366 U.S. 420, 445 (1961).

The intuitive sense of this analysis can be illustrated through an examination of other provisions of our law the validity of which even Plaintiffs would concede. There can be no doubt that legal proscriptions upon homicide,[77] robbery and theft,[78] perjury,[79] Sunday liquor sales,[80] adultery and bigamy,[81] incest,[82] as well as other offenses, are founded upon historic societal notions of morality.[83] Indeed, the Uniform Marriage Act, § 14-2-101, et seq., which is limited to heterosexual relationships, has

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[77]Sections 18-3-101 through 107, et seq., C.R.S. (1992). Compare Exodus 20:13 ("Thou shalt not kill.")

[78]Sections 18-4-301 through 304, and 18-4-401 through 415, et seq., C.R.S. (1992). Compare Exodus 20:15 ("Thou shalt not steal.")

[79]E.g., sections 1-13-104, 18-8-501 through 509, et seq., 24-4-104, 24-9.5-103, 24-12-106, 30-10-417, 42-2-122, and 42-3-104, C.R.S.(1992), among others. Compare Exodus 20:16 ("Thou shalt not bear false witness against thy neighbor.")

[80]Section 12-47-128, C.R.S. (1992). Compare Exodus 20:8 ("Remember the sabbath day, to keep it holy.")

[81]Sections 18-6-201 and 18-6-501, C.R.S. (1992). Compare Exodus 20:14 ("Thou shalt not commit adultery.")

[82]Sections 18-6-301 and 302, C.R.S. (1992). Compare Leviticus 18:6-12.

[83]"The law, however, is constantly based on notions of morality, and if all laws representing moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." Bowers v. Hardwick, 478 U.S. 186, 196 (1986), reh'g denied, 478 U.S. 1039 (1987).

as its express purpose "[t]o strengthen and preserve the integrity of marriage and to safeguard meaningful family relationships."[84] Nonetheless, such provisions cannot be said in any fashion to amount to an attempt by government to establish any religious doctrine. Since Amendment 2 does nothing to promote or inhibit a specific religion, it passes the second prong of the Lemon test.

Third, Amendment 2 does not foster excessive entanglement between government and religion. The entanglement analysis is one of degree and generally focuses on the amount of financial support given to religious organizations and the involvement of government in religion. Walz v. Tax Comm'n of New York, 397 U.S. 664, 668 (1970)("for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.") See also American Civil Liberties Union of Illinois v. City of St. Charles, 794 F.2d 265, 269-70 (7th Cir.), cert. denied, 479 U.S. 961 (1986); Amico v. New Castle County, 101 F.R.D. 472, 496 (D. Del. 1984), aff'd, 770 F.2d 1066 (3d Cir. 1985); Southside Fair Housing Comm. v. City of New York, 750 F. Supp. 575, 581 (E.D.N.Y. 1990), aff'd, 928 F.2d 1136 (2d Cir.

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[84]Section 14-2-102(2)(a), C.R.S. In addition, the federal government has long established a preference for traditional monogamous heterosexual relationships in laws such as the Internal Revenue Code. This preference has been uniformly upheld against constitutional challenge. E.g., Faraco v. Commissioner of Internal Revenue, 261 F.2d 387, 389 (4th Cir. 1958), cert. denied, 359 U.S. 925 (1959); Kellems v. Commissioner, 58 T.C. 556, 558-60 (1972), aff'd, 474 F.2d 1399 (2d Cir. 1973)(per curiam), cert. denied, 414 U.S. 831 (1973); Shinder v. Commissioner of Internal Revenue, 395 F.2d 222 (9th Cir. 1968).

1991). Amendment 2 contemplates no such sponsorship, financial support, or governmental involvement in religious activity.[85]

Perhaps most relevant here is the holding of National Gay Task Force v. Board of Educ. of the City of Oklahoma City, 729 F.2d 1270, 1273 (10th Cir. 1984), aff'd, 470 U.S. 903 (1985). There, a statute allowing teachers to be dismissed for homosexual activity was found not to violate the federal Establishment Clause. Obviously, if a statute which explicitly imposes a severe penalty upon homosexual conduct is constitutional, Amendment 2 cannot be viewed as violating the Establishment Clause.

IX. AMENDMENT 2 DOES NOT VIOLATE PLAINTIFFS' FEDERAL CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAWS

Plaintiffs assert that Amendment 2 abridges the Fourteenth Amendment's Equal Protection Clause because, in their view, Amendment 2: (1) creates a constitutional right to discriminate in any manner against homosexuals and bisexuals; (2) impermissibly restricts the ability of homosexuals and bisexuals to bring about change through ordinary political processes at the local or state general assembly levels; and (3) impermissibly infringes upon the rights of a suspect class.

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[85]Moreover, while the Plaintiffs may assert that Amendment 2 encourages political divisiveness along religious lines within Colorado in that some religions are opposed to it while others support it, this assertion, even if proven, is insufficient. It is clear that the promotion of political divisiveness along religious lines is not a consideration in determining violations of the Establishment Clauses except where the situation involves aid to parochial schools. Clayton by Clayton v. Place, 884 F.2d 376, 379 (8th Cir. 1989), cert. denied, 494 U.S. 1081 (1990).

The Fourteenth Amendment's Equal Protection Clause is "essentially a direction that all persons similarly situated . . . be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). The "general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." Id. at 440. See Harris v. the Ark, 810 P.2d 226, 230 (Colo. 1991). This general rule "gives way," however, when statutes infringe upon fundamental constitutional rights or affect one of a few number of "suspect" or "quasi-suspect" classes of people. Cleburne at 440-41; Harris, 810 P.2d at 230; Parrish v. Lamm, 758 P.2d at 1370. In such cases, the courts apply "heightened" scrutiny requiring the state to show, in cases affecting fundamental rights or "suspect" classes, a "compelling state interest," or, in cases affecting "quasi-suspect" classes, a substantial relationship to a sufficiently important governmental interest. Cleburne, 473 U.S. at 440-42; Parrish v. Lamm, 758 P.2d at 1370. In this case, neither a fundamental right nor a suspect or quasi-suspect class is implicated, therefore Amendment 2 need only be supported by a rational basis.

A. Amendment 2 Does Not Endorse Wholesale Discrimination Against Homosexuals and Bisexuals

Plaintiffs overstate their claim by suggesting that Amendment 2 authorizes any and all manner of public and private discrimination against homosexuals and bisexuals. Amendment 2 does not leave

homosexuals and bisexuals unprotected from governmental or private discrimination per se. The government must always have a rational basis to discriminate against homosexuals and bisexuals, and that rational basis must be applied to the specific context under consideration.[86] No government can, for instance, make employment decisions about homosexuals and bisexuals for reasons which are irrelevant to the performance of a particular job.[87] Nor can government deny to homosexuals and bisexuals the protections provided by law enforcement authorities. Similarly, Amendment 2 does not immunize private citizens from criminal (or civil) responsibility for assaultive activities, and confers no right upon private citizens to avoid contract obligations entered into with homosexuals and bisexuals. All Amendment 2 does -- for the private citizen -- is ensure that state or local government will not interfere with his or her choice about associating with homosexuals and bisexuals. If anything, all Amendment 2 does is re-confer the pre-existing common-law right of initial non-association with homosexuals and bisexuals.

Citing Reitman v. Mulkey, 387 U.S. 369 (1967), however, the Plaintiffs complain that Amendment 2 involves the State in

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[86]"Laws, or government practices must still, if challenged, pass the rational basis test of the equal protection clause," as that test is applied to the particular context in which the governmental action took place. See, e.g., Padula, 822 F.2d at 104 (FBI employment context).

[87]E.g., Gay Law Students Ass'n v. Pacific Tel. & Tel., 595 P.2d 592, 597 (Cal. 1979)(state cannot exclude homosexuals as a class from employment "without a showing the individual's homosexuality renders him unfit for the job for which he's been excluded.")

impermissible discriminatory action against them. In Reitman, the U.S. Supreme Court reviewed a California Supreme Court ruling invalidating a constitutional amendment which secured to private individuals the absolute discretion to determine to whom to sell or rent their real property. After considering the measure's immediate object, ultimate effect, and historical context, the California court had concluded that the right to discriminate on racial grounds was now embodied in the State's basic charter. 387 U.S. at 377. The U.S. Supreme Court noted that the California court "did not read either our cases or the Fourteenth Amendment as establishing an automatic constitutional barrier to the repeal of an existing law prohibiting racial discriminations in housing; nor did the court rule that a State may never put in statutory form an existing policy of neutrality with respect to private discriminations." Id. at 376. Nonetheless, the U.S. Supreme Court found "no persuasive considerations" to overturn the California court's judgment that the amendment would impermissibly "significantly encourage and involve the State in private discriminations" based on race. 387 U.S. at 381.

Reitman has never been cited as controlling authority by the U.S. Supreme Court, and it has never previously been held, either alone or in combination with such cases as Palmore v. Sidoti, 466 U.S. 429 (1984)(child custody decisions not to be influenced by racial prejudice), to create a fundamental right not to have a

State endorse or give effect to any type or degree of private bias.[88] See e.g., Citizens for Responsible Behavior v. Superior Court, 2 Cal. Rptr. 2d 648, 656-59 (Cal. App. 4th Dist. 1991)(citing Reitman and Palmore only to support use of a rational basis test to analyze ordinance affecting homosexuals and AIDS sufferers).

Indeed, the Reitman decision was hotly contested within the Court itself,[89] and has been largely limited to its specific

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[88]This, of course, forms the basis of this Court's January 15, 1993 ruling. The Defendants offer this argument in the event the Court might wish to reconsider its prior ruling.

[89]Justice Harlan, writing for a four-person dissent, saw that the majority had "contriv[ed] a new and ill-defined constitutional concept to allow federal judicial interference . . . ." 387 U.S. at 396.

> Here . . . we have only the straightforward adoption of a neutral provision restoring to the sphere of free choice, left untouched by the Fourteenth Amendment, private behavior with a limited area of the racial problem. The denial of equal protection emerges only from the conclusion by the Court that the implementation of a new policy of governmental neutrality, embodied in a constitutional provision and replacing a former policy of antidiscrimination, has the effect of lending en-couragement to those who wish to discriminate . . . . [T]his conclusion appears to state to me only a truism: people who want to discriminate but were previously forbidden to do so by state law are now left free because the State has chosen to have no law on the subject at all. Obviously whenever there is a change in the law it will have resulted from the concerted activity of those who desire the change, and its enactment will allow those supporting the legislation to pursue their private goals.
>
> A moment of thought will reveal the far-reaching possi-bilities of the Court's new doc-

factual context, i.e., racial discrimination.[90] Similarly, the "private bias" which was condemned in Palmore was of the same specific type -- racial prejudice -- which, after the Civil War and subsequent adoption of the Fourteenth Amendment, could never again be recognized by government as having any legitimate basis. In contrast, governmental action adversely affecting homosexuals and bisexuals would not have to rest on irrational prejudices or biases. See Bowers v. Hardwick, 478 U.S. 186, 196 (1986)(no fundamental right to engage in homosexual sodomy; States may, consistent with due process, criminalize such conduct based upon the moral judgments of their people).

> trine, which I am sure the Court does not intend. There can be little doubt that such permissiveness -- whether by express constitutional or statutory provision, or implicit in the common law -- to some extent 'encourages' those who wish to dis-criminate to do so. Under this theory of 'state action' in the form of laws that do nothing more than passively permit private discrimination could be said to tinge all private discrimination with the taint of unconstitutional state encouragement.

Reitman, 387 U.S. at 394-95 (Harlan, J., dissenting).

[90] Coleman v. Wagner College, 429 F.2d 1120, 1127 (2d Cir. 1970)("racial discrimination is so peculiarly offensive and was so much the prime target of the Fourteenth Amendment that a lesser degree of involvement may constitute 'state action' with respect to it than would be required in other contexts . . . .")(Friendly, J., concurring). See also Fletcher v. Rhode Island Hospital Trust Nat'l Bank, 496 F.2d 927, 931 (1st Cir. 1974) and Benschoter v. First Nat'l Bank of Lawrence, 218 Kan. 144, 542 P.2d 1042, 1047 (1975)(both citing Judge Friendly's concurrence with approval). Accord Anastasia v. Cosmopolitan Nat'l Bank of Chicago, 527 F.2d 150, 155 (7th Cir. 1975)(distinguishing Reitman v. Mulkey, 387 U.S. 369 (1967); Howe v. United Parcel Service, Inc., 379 F. Supp. 667, 674 (S.D. Iowa 1974)(a "double standard" exists for determining "state action" in race and other suspect class cases).

> In Hardwick, to be sure, plaintiffs did not rely on the equal protection clause . . . . [But i]f the Court was unwilling to object to state laws that criminalized the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.

Padulla v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987). Accord Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ("After Hardwick, it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm.") See also Ben-Shalom v. Marsh, 881 F.2d 454, 464-65 (7th Cir. 1989), cert. denied sub nom., 494 U.S. 1004 (1990).

The logic of these cases recognizes that in and of itself, government action adversely affecting homosexual and bisexuals would not implicate a fundamental right. This logic is applicable irrespective of whether one characterizes the classification as based upon either "conduct" or "status." Unlike criminal law, where an act is traditionally indispensible to a finding of criminal liability,[91] equal protection law is full of classifications that impact status, not conduct, and which are routinely upheld through use of the rational basis test. See Cleburne; Gregory v. Ashcroft, 111 S. Ct. 2395, 2406-08 (1991)(mandatory retirement scheme for state court judges). This is the case here. The class of homosexuals or bisexuals has not been alleged to be

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[91]Cf. Robinson v. California, 370 U.S. 660 (1962)(Eighth Amendment's Cruel and Unusual Punishment Clause forbade State from criminalizing one's status as a drug addict without reference to any particular act committed within the State).

significantly greater in scope than the class of those who actually engage in homosexual or bisexual conduct. See Ben-Shalom v. Marsh, 881 F.2d at 464 ("The Army need not shut its eyes to the practical realities of this situation, nor be compelled to engage in the sleuthing of soldiers' personal relationships for evidence of homosexual conduct . . . ."). It is for these reasons that federal cases validate status-based discrimination against homosexuals upon a showing of only a rational basis, rather than a compelling state interest. See Ben-Shalom, 881 F.2d at 463-64; Steffan v. Cheney, 780 F. Supp. 1, 4-5 (D. D.C. 1991).

Properly analyzed, Reitman and Palmore stand only for the proposition that government actions based upon racial considerations must, because of their suspect nature, be presumed to be premised upon impermissible considerations. Here, in contrast, homosexuals and bisexuals do not constitute a suspect class requiring such extraordinary protection. See pp. 72-74, infra.

B. Amendment 2 Does Not Impermissibly Burden Participation in the Political Processes

Plaintiffs complain that Amendment 2 is directed at depriving a single, identifiable minority group of the ability to seek special (and not constitutionally required) antidiscrimination protections from local or state authorities. Consequently, they say, Amendment 2 burdens their fundamental right to participate in political processes and that the amendment cannot be upheld in the absence of a showing of a "compelling state interest."

The Plaintiffs here attempt to rely on the fundamental rights prong. Plaintiffs rely upon a footnote in a recent California Court of Appeals case indicating that "[a]rguably" Amendment 2 "attempts to restrict the right to petition the government . . . because the right becomes a hollow exercise if the local government has been deprived of the power to grant redress of the subject grievance." Citizens for Responsible Behavior, 2 Cal. Rptr. 2d at 655 n.9. However, there is no requirement that legislative, executive, and judicial bodies be allowed to act with respect to every conceivable viewpoint. See, e.g., Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463, 464-65 (1979)(the First Amendment does not "impose any affirmative obligation on the government to listen or to respond . . . .") Indeed, neither the right to vote nor the right to petition encompasses the right to vote, or petition, for those matters which are beyond the competence of a governmental entity to address. See generally Higginson, A Short History of the Right to Petition Government for the Redress of Grievances, 96 Yale L.J. 142, 142-43, 159-61, 165-66 (1986).

Undaunted, Plaintiffs point to several federal cases, which, properly analyzed, again do not support their position. Although, in both Hunter v. Erickson, 393 U.S. 385, 393 (1969) and Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 468 (1982), the Supreme Court struck down provisions which would have made it more difficult for a cognizable group to push through protective

measures at a local level,[92] However, as these (and other cases) demonstrate, the basis for decision was not infringement upon a fundamental right, but discriminatory action against the already identified "suspect" classification of race.

In Hunter, the Court was concerned with a provision which "place[d] special burdens on racial minorities within the governmental process." 387 U.S. at 391. And immediately before analyzing the grounds urged in support of the provision, the Court had noted:

> Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, racial classifications are 'constitutionally suspect' and subject to the 'most rigid scrutiny.' They 'bear a far heavier burden of justification' than other classifications.

Id. at 391-92 (citations omitted).

A year after Hunter was decided, the Court in Lee noted "[t]he principle of Hunter is that the state creates an 'explicitly racial classification' whenever it differentiates between the treatment of problems involving racial matters and that afforded other problems

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[92]See Hunter v. Erickson, 393 U.S. 385, 393 (1969)(amendment to city charter repealed certain type of antidiscrimination ordinance passed by city council and required voter approval of that type of antidiscrimination ordinance before it could be put into effect); Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 468 (1982)(voter initiated statute removed previous power of school boards to order busing for purpose of desegregating schools); Lee v. Nyquist, 318 F. Supp. 710, 718-20 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971) (state legislature's statute barred state education officials and appointed school boards from taking action to integrate schools).

in the same area." 318 F. Supp. at 718.[93] And, two years after Hunter was decided, the Supreme Court was asked to apply it in James v. Valtierra, 402 U.S. 137 (1971), a case concerning the validity of a California constitutional measure prohibiting state public bodies from developing, constructing, or acquiring low income housing projects without prior approval by a majority vote in a city, town, or county referendum. A lower court had ruled, based on its reading of Hunter, that the California measure unconstitutionally discriminated against poor people in the right to seek redress from governmental entities. On appeal, however, the Supreme Court disagreed, finding that, unlike Hunter,

> it cannot be said that California's Article XXXIV rests on 'distinctions based on race.' . . . . The present case could be affirmed only by extending Hunter, and this we decline to do. . . . [A]ppellees contend that Article XXXIV denies them equal protection because it demands a mandatory referendum while many other referendums only take place upon citizen initiative. They suggest that the mandatory nature of the Article XXXIV referendum constitutes unconstitutional discrimination because it hampers persons desiring public housing from achieving their objective when no such roadblock faces other groups seeking to influence other public decisions to their advantage. But of course a law-making procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group.

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[93]See also Tyler v. Vickery, 517 F.2d 1089, 1099 (5th Cir. 1975)(characterizing Hunter as striking "down a city charter amendment requiring voter approval of certain antidiscrimination ordinances on the ground that the amendment created a classification based on race.")

402 U.S. at 141-42.

Eleven years later, Justice Lewis F. Powell echoed some of the very same sentiments:

> The political process in Washington, as in other States, permits persons who are dissatisfied at a local level to appeal to the state legislature or the people of the State for redress. It permits the people of a State to pre-empt local policies, and to formulate new programs and regulations. Such a process is inherent in the continued sovereignty of the States. This is our system. Any time a State chooses to address a major issue some persons or groups may be disadvantaged. In a democratic system there are winners and losers. But there is no inherent unfairness in this and certainly no constitutional violation.

Seattle School Dist. No. 1, 458 U.S. at 496 (Powell, J., dissenting).

Admittedly, Justice Powell's comments were made in the course of issuing a vigorous dissent on behalf of four members of the Court. However, these comments lose none of their persuasive value in the present context since the majority opinion in Seattle School District rested squarely on "an immediate and crucial difference" from the present case: a race-based classification. Indeed, the majority in Seattle School District No. 1 wrote:

> the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the racial nature of a decision to determine the decision-making process.

458 U.S. at 470 (emphasis in original). Later in that same opinion, the majority wrote:

> When the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the 'special condition' of prejudice, the governmental action seriously 'curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities.' In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'

458 U.S. at 486.

Properly analyzed, Hunter, Lee, Valtierra, and Seattle School Dist. No. 1 are not fundamental rights cases; rather, they recognize a cause for constitutional equal protection complaint only when the political process has been restructured to place unusual burdens upon racial groups,[94] or, in the most expansive sense, upon "those groups . . . relegated to such a position of political powerlessness as to command extraordinary protection from majoritarian political process." Seattle School Dist. No. 1, 458 U.S. at 486. These latter groups are, of course, the few which have been identified as "suspect" classes.[95]

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[94]See Note, The Hunter Doctrine: An Equal Protection Theory That Threatens Democracy, 38 Vand. L. Rev. 397, 421-26 (1985)(Hunter doctrine limited to state action embodying a racial classification).

[95]See San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1, 28 (1973)(cited in Seattle School District; "political powerlessness" phrase used to describe suspect class); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976)(reiterating Rodriquez test for suspect class; also, correlating the "discrete and insular minorities" language of United States v. Carolene Products Co., 304 U.S. 144, 152-53 n. 4 (1938) to the concept of "suspect" class). See also Citizens for Responsible Behavior, 2 Cal. Rptr. 2d 648, 655 (Cal. App. 4th Dist. 1991)

Plaintiffs have also relied on other U.S. Supreme Court decisions which are inapposite here.[96] This is not, after all, a case where homosexuals and bisexuals have been denied the right to vote in upcoming general elections, see Hill v. Stone, 421 U.S. 289 (1975)(voters in city bond elections limited to persons who have made available some real, mixed, or personal property); Kramer v. Union Free School Dist., 395 U.S. 621 (1969)(voters in school district election limited to persons owning or leasing taxable real property or parents or custodians of children enrolled in schools), nor where reapportionment or other state action has demeaned the value of their individual votes, see Reynolds v. Sims, 377 U.S. 533 (1964).[97] Unless the individual Plaintiffs can demonstrate that they are a suspect class, they must relinquish the claim that Amendment 2 violates the Equal Protection Clause by limiting them to petitioning local and state legislators, or the people them-

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("Hunter was a 'strict scrutiny' case in which the law invalidly classified the affected parties on the basis of traditionally suspect characteristics.")

[96]Similarly, to the extent the Plaintiffs' attempt to cite The Federalist Papers to support an equal protection challenge, such arguments must fail. For example, in 1787 women, non-property holders, and felons, to say nothing of blacks held in chattel slavery, were all identifiable groups who were explicitly prohibited from participating in ordinary political processes, not to mention the fact that The Federalist Papers were authored some eight decades before the framing of the Fourteenth Amendment.

[97]"The one-person, one-vote doctrine requires no more, and does not create rights and privileges beyond the warranty of mathematical equivalency of votes." Mrazek v. Sufolk County board of Elections, 630 F.2d 890, 898 (2d Cir. 1980). "Of course, the effectiveness of any citizen's voice in governmental affairs can be determined only in relationship to the power of other citizens' votes." Kramer v. Union Free School Dist., 395 U.S. 621, 627 n.7 (1969).

selves, to assist them in getting Amendment 2 repealed.

C. Homosexuals and Bisexuals Do Not Constitute a "Suspect" or "Quasi-Suspect" Class

As this brief has already demonstrated, Amendment 2 does not on its face impinge upon any of Plaintiffs' fundamental constitutional rights. Furthermore, the individual Plaintiffs are not enetitled to heightened protections as members of any "suspect" or "quasi-suspect" class. To date, the U.S. Supreme Court has recognized but five categories of suspect or quasi-suspect class status entitled to heightened scrutiny of state action.[98] It has never identified homosexuals and bisexuals as a "suspect" or "quasi-suspect" class needing special protection,[99] and every circuit court of appeals which has ruled on the issue has rejected the claim that homosexuals (and, by implication bisexuals) constitute a "suspect" or "quasi-suspect" class. See High Tech

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[98]Loving v. Virginia, 388 U.S. 1, 11 (1967)(racial status, suspect class); Korematsu v. United States, 323 U.S. 214, 216 (1944)(national ancestry and ethnic origin, suspect class); Graham v. Richardson, 403 U.S. 365, 372 (1971)(alienage, suspect class); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982) (gender, quasi-suspect class); and Lalli v. Lalli, 439 U.S. 259, 265 (1978) (illegitimacy, quasi-suspect class).

[99]Indeed, the Supreme Court is very reluctant to expand the number of "suspect" and "quasi-suspect" classes, e.g., Cleburne v. City of Cleburne Living Center, 473 U.S. 432, 441 (1985), and its decision in Hardwick logically refutes any claim that it would extend such protection to homosexuals and bisexuals. See L. Tribe, American Constitutional Law, § 16-33, 1616 n.47 (2d ed. 1988)(in the aftermath of Hardwick it is "unlikely . . . that homosexuality will be deemed quasi-suspect in the near future"). See also Padula, 822 F.2d at 103; Ben-Shalom, 881 F.2d at 464; Woodward, 871 F.2d at 1076; High Tech Gays, 895 F.2d at 563.

Gays v. Defense Investigations Security Clearance Office, 895 F.2d 563, reh'g denied, 909 F.2d 375 (9th Cir. 1990); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); National Gay Task Force v. Board of Educ., 729 F.2d at 1273; Ben-Shalom v. Marsh, supra; Padula v. Webster, supra.[100]

In attempting to show that they qualify for "suspect" or "quasi-suspect" class protection, the Plaintiffs must demonstrate: (1) there has been a history of discrimination against homosexuals and bisexuals; (2) homosexuals and bisexuals exhibit obvious, immutable, or distinguishing characteristsics that define them as a discrete group; and (3) homosexuals and bisexuals are politcally powerless. E.g., Bowen v. Gilliard, 483 U.S. 587, 602-03 (1987); Cleburne, 473 U.S. at 440-46; High Tech Gays, 895 F.2d at 573-74.

The Plaintiffs' have failed to allege these criteria, and so as a matter of law do not state a claim for suspect or quasi-suspect protection. Even so, even if we assume sexual orientation is immutable,[101] their claim for heightened protection must still fail as a matter of law. Not all immutable characteristics entitle persons to special or protected status. E.g., Cleburne, 473 U.S.

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[100]See also Doe v. Webster, 769 F. Supp. 1, 2 (D. D.C. 1991); Todd v. Navarro, 698 F.Supp. 871, 874 (S.D.Fla. 1988); and In re Opinion of the Justices, 129 N.H. 290, 530 A.2d 21 (N.H. 1987).

[101]It must be noted that, as a matter of law, this is far from established. See, High Tech Gays v. Defense Investigations Security Clearance Office, 895 F.2d 563, 573 reh'g denied, 909 F.2d 375 (9th Cir. 1990); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); National Gay Task Force v. Board of Education, 729 F.2d 1270, 1273 (10th Cir. 1984); and Steffan v. Cheney, 780 F. Supp. 1, 6-7 (D. D.C. 1991).

at 440-47 (mental illness). In this respect, the Plaintiffs cannot show they are politically powerless as that term is used in this context. Cleburne, 473 U.S. at 445 (political powerlessness is measured not in terms of ultimate success, but in terms of "ability to attract the attention of the lawmakers.")[102]

D. Amendment 2 is Supported by Adequate Rational Bases

Given that homosexuality and bisexuality are not suspect classes, and Amendment 2 does not infringe upon any fundamental right, in order to prevail, the Plaintiffs must demonstrate that no rational relation exists between the goals and the effects of Amendment 2. Colorado Dep't of Social Services v. Board of County Comm'rs of Pueblo County, 697 P.2d 1, 15 (Colo. 1985). Under the rational basis test, the United States Supreme Court:

> presumes that, absent some reason to infer antipathy, even improvident decisions will be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch acted. Thus, we will not overturn such a statute unless the varying treatment of different groups is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

Vance v. Bradley, 440 U.S. 93, 97 (1979). Accord Gregory v. Ashcroft, 111 S. Ct. at 2406. See also MSM Farms, Inc. v. Spire, 927 F.2d 330, 333 (8th Cir. 1991)(applying rational test to measures adopted through referendum). In effect, in applying the

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[102]The present maelstrom surrounding this case only serves to underscore the political clout of the Plaintiffs. See also High Tech Gays, 895 F.2d at 574; Steffan v. Cheney, 780 F. Supp. at 8-9.

rational basis test, this Court must ask whether it is conceivable that Amendment 2 bears some rational relationship to any legitimate purpose of government. See Pennell v. City of San Jose, 485 U.S. 1, 14 (1988).

Citing Citizens for Responsible Behavior, Plaintiffs claim that no rational basis can be shown to support Amendment 2. In Citizens for Responsible Behavior, the California Court of Appeals held invalid a proposed initiative measure entitled "Citizens' Ordinance Pertaining to Homosexuality and AIDS."[103] The court found that the reasons proffered by a California citizens' group for the ordinance -- purported bizarre practices, gross promiscuity, and willful exposure to probable disease -- insufficient to justify it. 2 Cal. App. 2d at 657-59.

Assuming arguendo the correctness of the California court's assessment, Defendants note that the purposes advanced in that case are not those offered here in support of the narrower Amendment 2. Although references to some of these same reasons appear in materials submitted by the amendment's sponsors to the Legislative Council, this Court is not limited solely to those reasons. E.g., Thomas v. Sullivan, 922 F.2d 132, 136 (2d Cir. 1990). Rather, the Court must consider any rational purpose possibly motivating its

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[103]The measure would have repealed parts of antidiscrimination ordinances referring to "sexual orientation" and "AIDS sufferers;" and it would have barred the city from enacting any policy or law classifying AIDS or homosexuality as the basis for an unlawful discriminatory practice, providing preferential treatment or affirmative action on the basis of sexual orientation or AIDS, or promoting, encouraging, endorsing, legitimizing, or justifying homosexuality.

passage. Mountain Water Co. v. Montana Dep't of Public Service Regulation, 919 F.2d 593, 597 (9th Cir. 1990). See also Millis v. Board of County Comm'rs of Larimer County, 626 P.2d 652, 658 (Colo. 1981). Further, "if any state of facts reasonably may be conceived to justify it," Amendment 2 must be upheld. Sullivan v. Stroop, 496 U.S. 478, 485 (1990).[104] Indeed, the State may pursue legitimate objectives through means that are imperfect, even "illogical . . . and unscientific." United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 177 (1980).

Moreover, contrary to the Plaintiffs' assertions, it is the party challenging the constitutionality which must convince the Court beyond a reasonable doubt,[105] that no conceivable purpose for Amendment 2 is rationally related to a legitimate governmental interest. See Vance, 440 U.S. at 101, 111; Gregory v. Ashcroft, 111 S. Ct. at 2407-08.[106]

Analysis of Amendment 2 easily reveals a sufficient fit between its legitimate goals and chosen means. The legitimate

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[104]See also Roley v. Pierce County Fire Protection Dist. No. 4, 869 F.2d 491, 493 (9th Cir. 1989) Dimond v. District of Columbia, 792 F.2d 179, 186 (D.C. Cir. 1986); Wheeler v. United States, 768 F.2d 1333, 1337 (Fed. Cir. 1985), cert. denied, 474 U.S. 1081 (1986).

[105]See People v. Ford, 773 P.2d 1059, 1062 (Colo. 1989).

[106]The Plaintiffs' reliance on City of Cleburne v. Cleburne Learning Center, 473 U.S. 432 (1985) for the proposition that the State must prove rationality is misguided. Such a change in the law, which would be both fundamental and far-reaching, was not accomplished by Cleburne. See Gregory v. Ashcroft, 111 S. Ct. 2395, 2407-08 (1991) and Steffan v. Cheney, 780 F. Supp. at 10. See also Baker v. City of Concord, 916 F.2d 744, 748 (1st Cir. 1990).

goals supporting Amendment 2 include promoting associational and religious rights, maintaining the integrity of established civil right protections, and achieving statewide uniformity on this divisive issue.

The Plaintiffs first dispute that the Amendment is rationally related to protecting free exercise of religion. Plaintiffs suggest that full religious protection would block the application of all civil rights laws. It is entirely rational, however, for the State recognize that the free exercise of religion is a competing constitutional value, and to attempt to strike an appropriate balance.[107] Moreover, even if religious objections could be raised to other civil rights laws, the State could rationally recognize a strong interest in maintaining special civil rights protections for classifications already deemed suspect, or as to which a statewide (legislative or popular) consensus exists, but not for other groups. Finally, it is no challenge, under rational basis review, to say that a law could have been more or less inclusive. United States R.R. Retirement, 449 U.S. at 177-79. Equal protection does not forbid the State from addressing policy objectives on an incremental basis. Williams v. Lee Optical, 348 U.S. 483, 489 (1955).

For similar reasons, the Plaintiffs fail in their attack on Amendment 2's tendency to promote freedom of association. The Plaintiffs assert that special protections for gays would not burden associational rights any more than existing civil rights

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[107]Cf. Wisconsin v. Yoder, 406 U.S. 205 (1972).

laws. The argument contains its own refutation: the addition of any new protected groups infringes incrementally on the right of private individuals to choose their own associations. Conversely, any refusal to extend the universe of protected classes preserves a corresponding zone of choice to private actors. Also, as noted above, the State may have chosen to effect an expansion of private associational rights, while preserving more generally accepted civil rights protections.

The Plaintiffs next take issue with Amendment 2's tendency to maintain the integrity of established civil rights protections. The circuitous discussion of what type of consensus might be needed to extend civil rights laws misses a simple point: by enacting Amendment 2, the people have clearly said that they do not support the addition of another protected class to existing civil rights laws. This strengthens existing protections in at least two ways. First, as a practical matter, civil rights enforcement bodies will have more budget and staff for their existing mission, rather than be spread thinner into new areas. Second, the addition of each new group with sufficient influence to attain protected status could diminish broad-based respect for the goals and requirements of civil rights laws. Amendment 2 turns back that process.[108]

The Plaintiffs also attempt to dismiss the stated objective of achieving statewide uniformity as mere description, rather than an

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[108]The Plaintiffs claim that the State is being "selective" in limiting expansions. The argument inverts reality. The people merely responded to current concerted efforts to expand protections.

independent objective. Clearly, the State could have believed it advantageous to enable large employers and property owners to operate under more uniform laws throughout the State. Providing greater economic and legal predictability is a legitimate objective rationally furthered by Amendment 2.

Even if these grounds were inadequate, Amendment 2 would nonetheless be sustainable under Bowers v. Hardwick, as expressing society's moral judgment that certain behavior or orientation should not give rise to additional legal protections. In this case, society's moral judgment is not that certain perosns should be punished for their sexual orientation, but rather that such orientation should not be a basis for additional or special rights. There is "a substantial government interest in protecting order and morality." Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2462 (1991)(plurality opinion)(citing Paris v. Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973); Roth v. United States, 354 U.S. 476, 485 (1957); and Bowers v. Hardwick, 478 U.S. 186, 196 (1986)). See also Barnes, 111 S. Ct. at 2467 (Scalia, J., concurring) (standards of morality satisfy rational basis test).

In conclusion, Amendment 2 does not encourage or authorize public or private discrimination, in contravention of the Fourteenth Amendment. While a state or local government can grant more protection than that required by the United States Constitution, the State or local government can rescind that additional protection without committing a federal constitutional violation. Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527, 538-39

(1982)(upholding a state constitutional amendment prohibiting state courts from ordering forced busing for the purposes of desegregation unless there was a violation of the United States Constitution).

X. THE INITIATIVE POWER IS RESERVED TO THE PEOPLE BY THE TENTH AMENDMENT OF THE U.S. CONSTITUTION

Even if Amendment 2 is found to be in conflict with the Fourteenth Amendment to the U.S. Constitution, it is nonetheless valid as an exercise of the people's reserved powers under the Tenth Amendment. The Tenth Amendment provides: "The powers delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[109]

While this reservation of powers has never been the subject of judicial interpretation, courts are obligated to give full effect and force to each provision of the Constitution. Ullman v. United States, 350 U.S. 422, 428 (1956); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).[110] In the Tenth Amendment, the Constitution explictly validates reservations of power to the people, as distinguished from powers reserved to the several States. Therefore, cases such as Garcia v. San Antonio Metropolitan Transit

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[109]U.S. Const. amend. X (emphasis supplied).

[110]It bears noting that the Tenth Amendment is part of the federal Bill of Rights, having been adopted simultaneously with the first nine amendments. As such, it must be regarded as on an equal footing and not inconflict with those provisions upon which the Plaintiffs base all of their federal "fundamental rights" claims.

Auth., 469 U.S. 528 (1985) are inapposite. The considerations which mitigate against recognition and vindication of Tenth Amendment rights as to States -- most notably the national political process, Garcia, 469 U.S. at 551-52 -- are not applicable to situations where the people themselves have exercised their sovereign power over their government.[111]

> [T]he ultimate authority, wherever the derivative may be found, resides in the people alone, and that it will not depend merely on the comparative ambition or address of the different governments whether either, or which of them, will be able to enlarge its sphere over the other. Truth, no less than decency, requires that the event in every case should be supposed to depend on the sentiments and sanction of their common constituents.

The Federalist, No. 46 (J. Madison).

The federal constitution explictly authorizes such a reservation of power, and the state constitution makes a further explicit reservation of the initiative and referendum power to the people. Colo. Const. art. V, § 1. In fact, "the people always possessed the sole right to amend the constitution and never limited themselves as to the contents of amendments to it." People v. Prevost, 55 Colo. 199, 211, 134 P. 129, 133 (1913). "The people have the sovereign right to amend their constitution if they so

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[111]However, even the Garcia Court, in rejecting the "integral" or "traditional" function approach, recognized that there are substantive components of the reservation of powers to the States. "If there are to be limits on the Federal Government's power to interfere with state functions -- as undoubtedly there are -- we must look elsewhere to find them." Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528,547 (1985). See also, Coyle v. Smith, 221 U.S. 559 (1911); and New York v. United States, 112 S. Ct. 2408 (1992).

desire, and courts have no power to amend it for them." Id., 55 Colo. at 212, 134 P. at 133. Furthermore, "[t]his right is of the first order; it is not a grant to the people but a reservation by them for themselves." McKee v. City of Louisville, 200 Colo. at 529, 616 P.2d at 972 (citing In re Legislative Reapportionment, 150 Colo. 380, 374 P.2d 66 (1962).

Perhaps most instructive here is the recent decision in Gregory v. Ashcroft, 501 U.S. ___, 111 S. Ct. 2395 (1991), where the U.S. Supreme Court considered the enforceability of the federal Age Discrimination in Employment Act ("ADEA").[112] In invalidating the applicability of the ADEA to a mandatory retirement age for state judges, the Court held that as against the federal Commerce Power, "the authority of the people of the States to determine the qualifications of their government officials may be inviolate." 111 S. Ct. at 2402-03. In distinguishing the case before it from traditional federalism jurisprudence, the Court relied heavily upon the "political function" doctrine, which concerns matters "intimately related to the process of democratic self-government." Id. at 2402. This rule is founded upon "a recognition of a State's constitutional responsibility for the establishment and operation of its own government . . . ." Id.[113] The Court then noted that:

> this Court has never held that the [Fourteenth] Amendment may be applied in complete

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[112]29 U.S.C. §§ 621-634.

[113]Cf. Gregory v. Ashcroft, 501 U.S. ___, 111 S. Ct. 2395, 2405 (1991) ("These cases demonstrate that the Fourteenth Amendment does not override all principles of federalism.")

> disregard for a State's constitutional powers. Rather, this Court has recognized that the States' power to define the qualifications of their officeholders has force even as against the proscriptions of the Fourteenth Amendment.

Id. at 2405.

The initiative process, particularly as applied to a constitutional amendment, is an integral part of popular self-government as established in Colorado. As such, it "is a power reserved to the States under the Tenth Amendment and guaranteed them by [the Guaranty Clause]," 111 S. Ct. at 2402 (citing Sugarman v. Dougall, 413 U.S. 634, 648 (1973), and has force "even as against the proscriptions of the Fourteenth Amendment."[114] Therefore, the Plaintiffs' federal constitutional challenges to the adoption of Amendment 2, as an exercise of Colorado's initiative process must be dismissed.

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[114]In this light, it is arguable that even if Amendment 2 would otherwise be invalid under the Fourteenth Amendment, the absence of "state action" might well insulate it from a facial constitutional challenge such as the one in this case.

CONCLUSION

For the foregoing reasons, based upon the authorities cited, Defendants respectfully request that this Court dismiss this case.

Respectfully submitted this 29th day of January, 1993.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within BRIEF IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT on all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado, this 29th day of January 1993, addressed as follows:

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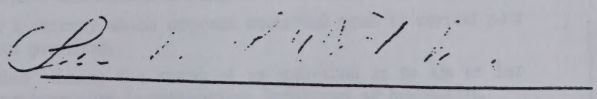

No Protected Status

AMENDMENT 2 – CONSTITUTIONAL AMENDMENT INITIATED BY PETITION

No Protected Status

Ballot Title: *An amendment to Article II of the Colorado Constitution to prohibit the state of Colorado and any of its political subdivisions from adopting or enforcing any law or policy which provides that homosexual, lesbian, or bisexual orientation, conduct, or relationships constitutes or entitles a person to claim any minority or protected status, quota preferences, or discrimination.* *

Provisions of the Proposed Constitutional Amendment

The proposed amendment to the Colorado Constitution would:

– prohibit the state, its branches or departments, or any of its agencies, political subdivisions, municipalities, and school districts from adopting or enforcing any law or policy that entitles any person to claim discrimination, protected status, minority status, or quota preferences based on homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships; and

– make all existing anti-discrimination ordinances, laws, regulations, and policies prohibiting discrimination based on an individual's homosexual, lesbian, or bisexual orientation unenforceable and unconstitutional.

Definitions

For the purposes of this analysis, the following terms have the given meanings:

– **"Civil rights laws"** refers to local, state, and federal laws designed to protect classes of persons from discrimination in areas such as employment, housing, and public accommodations.

– **"Constitutional rights"** refers to the guarantees contained in the federal Bill of Rights (first ten amendments to the United States Constitution) and made applicable to the states through the Fourteenth Amendment.

– **"Discrimination"** as commonly used in civil rights law, means any act which denies, prevents, or limits any person from obtaining or maintaining employment, housing, or public accommodations based on race, age, gender, disability, nationality, or religion. Some states and localities have extended similar protections against discrimination based on factors such as marital or familial status, military status, sexual orientation, or political affiliation.

– **"Equal protection"** refers to the clause in the Fourteenth Amendment to the United States Constitution which prohibits any state from adopting any law which denies the equal protection of the laws guaranteed to the citizens of the United States.

– **"Political subdivision"** generally refers to a county, municipality, school district, local junior college district, special district, water conservation district, cooperative agency, regional commission, or an Indian tribe organized pursuant to the federal "Indian Reorganization Act of 1934," as amended.

– **"Protected status"** means that a group has been identified for protection from actions which affect a protected or suspect class and which are limited or scrutinized as required by anti-discrimination statutes, ordinances, or common law.

– **"Quota"** refers to a remedy which imposes numerical goals to correct past discriminatory employment practices.

– **"Sexual orientation"** means the status of an individual as to his or her sexuality, for example, heterosexuality, homosexuality, lesbianism, or bisexuality.

No Protected Status

Background

The proposed amendment arises in the context of three decades of increased governmental activity in the area of civil rights. The concepts of the federal Civil Rights Act of 1964 have been extended by Congress, the states, and local governments which have enacted new laws and strengthened existing laws to prohibit discrimination in employment, housing, access to public accommodations, and other areas involving civil rights. Courts at all levels are involved in interpreting and applying these laws, and administrative agencies have been created to enforce some of them. The proposed amendment identifies one area – discrimination based on homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships – in which civil rights laws and policies could not be enacted or enforced by the state government or by local governments in Colorado.

Evidence of discrimination. There is disagreement concerning the extent of discrimination against homosexuals, lesbians, and bisexual persons. Discussions with public agencies which maintain records on such discrimination complaints reveal that these individuals have been found to experience discrimination in access to employment, housing, military service, commercial space, public accommodations, health care, and educational facilities on college campuses. For example, of the 50 complaints reported to the Denver Agency for Human Rights and Community Relations in 1991, twenty-three were incidents of discrimination based on sexual orientation. Approximately 61 percent of these reports dealt with employment discrimination. Since 1988, the Boulder Office of Human Rights has investigated ten incidents of discrimination based on sexual orientation. Four of the complaints lacked sufficient evidence to be considered discrimination based on sexual orientation. It is generally recognized that discrimination complaints often go unreported because individuals fear the repercussions and further victimization associated with disclosure of their sexual orientation.

Current Laws and Policies

Presently, a patchwork of federal, state, and local laws, regulations, and policies are in effect which monitor, offer limited protection against, or prohibit discrimination based on sexual orientation.

Local ordinances. Three home rule cities – Aspen, Boulder, and Denver – have ordinances protecting individuals from job, housing, and public accommodations discrimination when that discrimination is based solely on sexual orientation. None of the ordinances requires quotas, affirmative action, minority status or requires that employers or landlords seek out homosexual, lesbian, or bisexual employees or tenants. These cities have determined that discrimination based on sexual orientation was a sufficient problem to warrant protections against discrimination in the areas of employment, housing, and public accommodations.

Aspen's ordinance prohibits discrimination in the areas of employment, housing, and public accommodations because of race, creed, color, religion, ancestry, national origin, sex, age, marital or familial status, physical handicap, sexual orientation, or political affiliation. The Aspen ordinance does not exempt religious institutions. In Boulder, religious institutions cannot refuse to hire an individual or restrict access to public accommodations or housing because of that person's race, creed, color, gender, sexual orientation, marital or familial status, pregnancy, national origin, ancestry, age, or mental or physical disability. The Denver ordinance entirely exempts religious institutions, thus allowing them to refuse to hire persons or restrict access to public accommodations or housing based on a person's sexual orientation.

In Boulder, the owner of an owner-occupied, one-family dwelling or duplex is not permitted to deny housing to an individual based on his or her sexual orienta-

tion. However, the ordinance does allow owners to limit renters or lessees to persons of the same sex. In Denver, owners with rental spaces in their homes or duplexes (in which they reside) are exempted from the ordinance.

The anti-discrimination laws in these three cities do not classify homosexual, lesbian, or bisexual persons as ethnic minorities, but instead outlaw discrimination based on sexual orientation. These laws banning discrimination based on sexual orientation also prohibit discrimination against heterosexual individuals as well as against homosexual, lesbian, and bisexual persons. Attempts to pass similar anti-discrimination ordinances based on sexual orientation were defeated in Colorado Springs and Fort Collins. In addition, Denver Public Schools has adopted a nondiscrimination policy prohibiting discrimination based on sexual orientation.

State laws and policies. In 1990, the Governor issued an executive order prohibiting discrimination based on sexual orientation in the hiring, promotion, and firing of classified and exempt state employees. The order applies to executive departments and to state institutions of higher education. Metropolitan State College of Denver has a policy prohibiting college sponsored social clubs from discriminating in membership on the basis of sexual orientation. Colorado State University has a general nondiscrimination policy prohibiting discrimination based on sexual orientation. Conversely, the University of Colorado Board of Regents defeated a resolution prohibiting discriminatory practices based upon sexual orientation. The only Colorado statute offering protection based on sexual orientation prohibits health insurance companies from determining insurability based on an individual's sexual orientation. Legislation was defeated in 1991 which would have expanded Colorado's ethnic intimidation law to include the right of every person, regardless of age, handicapping condition or disability, or sexual orientation, to be protected from harassment. Recently, the Colorado Civil Rights Commission voted to recommend that the state's civil rights law be amended to prohibit discrimination based on sexual orientation.

Federal laws. There are no federal civil rights laws that protect persons from discrimination based on sexual orientation in the areas of housing, employment, or public accommodations. However, the federal Hate Crime Statistics Act of 1990 requires the United States Attorney General to monitor, in addition to other crimes, those crimes that manifest evidence of prejudice based on sexual orientation.

Laws and policies in other states, municipalities, and higher education institutions. Anti-discrimination laws and policies based on sexual orientation are not unique to Colorado. Six states (Connecticut, Hawaii, Massachusetts, New Jersey, Vermont, Wisconsin) and the District of Columbia, and approximately 110 cities and counties in 25 states have passed legislation protecting homosexual, lesbian, and bisexual persons from discrimination based on sexual orientation in employment, housing, and public accommodations. In contrast, the voters in Oregon will be considering an initiated measure, which among other provisions, would outlaw legislation aimed at protecting homosexual, lesbian, and bisexual persons from discrimination based on sexual orientation. In 1988, the voters in Oregon overturned an executive order that would have protected homosexual individuals from discrimination in state government.

Governors of eight states besides Colorado (California, Minnesota, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, and Washington) have issued executive orders prohibiting discrimination in state employment based on sexual orientation. Nationally, around 65 college and university systems have issued nondiscrimination statements protecting heterosexual, homosexual, lesbian, and bisexual persons.

Impact of the Proposal

Passage of the amendment would make unenforceable and unconstitutional those ordinances which prohibit discrimination based on sexual orientation with regard to homosexual, lesbian, and bisexual persons. Therefore, the portion of those ordinances prohibiting discrimination based on sexual orientation adopted by the city council or approved by the voters in the cities of Aspen, Boulder, and Denver would be rendered invalid. In addition, the amendment would nullify existing anti-discrimination policies based on sexual orientation which have been adopted by any state branch of government, department, agency, or school district in Colorado and would prevent adoption of any state statute, local ordinance, or policy for public entities which prohibits discrimination based on sexual orientation. The amendment would not affect the anti-discrimination policies based on sexual orientation that have been adopted by numerous private employers. However, the amendment does not address the rights of heterosexual individuals to bring claims of discrimination under existing or future ordinances, therefore the impact of the amendment on the rights of heterosexuals is not known.

Arguments For

1) There is no evidence that homosexual, lesbian, and bisexual individuals are sufficiently disadvantaged to warrant designation as a protected class. Protected class status is not a basic right guaranteed to all citizens by the United States Constitution. In general, protected class status has been afforded to groups which have historically been subjected to purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process, or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. Some groups which have been given protection are those identified because of national origin, culture, age, disability, gender, religion, and marital or familial status. Similarly, there are no organized, state-sanctioned legal barriers which deny their ability to participate in the political process as has been the situation faced by racial minorities, in particular. For these reasons, it appears that this amendment may pass constitutional muster.

2) Homosexual, lesbian, and bisexual persons do not require protected status because they are entitled to recourse under the tort laws for libelous or slanderous abuse, wrongful discharge, emotional distress, or similar theories. Since homosexual, lesbian, and bisexual persons cross all cultural lines they may already receive protections with regard to race, gender, age, ethnicity, disability, religion, or marital or familial status. Insufficient evidence exists for creating a legal cause of action by homosexual, lesbian, and bisexual individuals in employment, housing, and public accommodations to warrant adding sexual orientation as a protected class.

3) Granting protected status to homosexual, lesbian, and bisexual persons may compel some individuals to violate their private consciences or to face legal sanctions for failure to comply. For some individuals, homosexuality, or bisexuality conflicts with their religious values and teachings or their private moral values. If a landlord is required to rent an apartment, for example, to homosexual, lesbian, or bisexual persons, he or she may be asked to either condone a lifestyle of which they do not approve or to be in violation of a local ordinance. People and institutions should have the right to express and act upon their moral convictions without being accused of discrimination.

4) The amendment does not have a negative impact on home rule autonomy of Colorado cities nor does it intrude into traditional powers of local government. The Colorado Constitution guarantees local municipalities the ability to function legislatively only in municipal affairs. Civil rights issues are not normally considered by

local governments. Because of the importance of these issues, a wider spectrum of individuals than just municipalities should consider these matters. Consideration of individual and group civil rights on the municipal level sets an improper precedent and only serves to dilute the original purpose of legislation enacting civil rights protections.

5) A proliferation of local ordinances or the possibility of a state statute that would provide protected status for homosexual, lesbian, and bisexual persons may divert resources for current enforcement activities. Additional discrimination cases may produce a demand for more staff and other state and local resources to investigate complaints, resolve disputes, or litigate cases.

Arguments Against

1) All individuals should be accorded the same basic dignity, right to privacy, privileges, and protections guaranteed to every citizen. Discrimination against any class of individuals is wrong and, if tolerated, can easily spread to any and all groups in our society. In a pluralistic society, a threat to the rights of any one group should be viewed as a threat to the rights of all citizens. The amendment deprives homosexual, lesbian, and bisexual persons of legal protection against discrimination based on sexual orientation by isolating them as a class which could not be protected by such civil rights laws. Civil rights laws are constantly evolving to meet the demands of society, and no group of people should be precluded from seeking civil rights protection or protection from discrimination. Civil rights laws prohibiting discrimination against homosexual, lesbian, and bisexual persons do not condone or encourage homosexuality or bisexuality; rather, they only condemn discrimination of any nature and ensure equal opportunity for every citizen. By eliminating legal protections, the amendment sanctions prejudicial acts against homosexual, lesbian, and bisexual persons.

2) Because homosexual, lesbian, and bisexual persons face discrimination in employment, housing, and public accommodations and are victims of hate crimes, civil rights laws are needed that prohibit discrimination based on sexual orientation. Without the ordinances, existing laws inadequately protect these individuals and fail to address discrimination in employment, housing, and public accommodations. Homosexual, lesbian, and bisexual individuals belong to all economic classes and are members of all racial, ethnic, disability, age, and religious communities. Because the kind of discrimination that these individuals experience is solely connected to a person's sexual orientation, the added protection in the ordinances gives homosexual, lesbian, and bisexual individuals legal recourse should they be discriminated against on the basis of their sexual orientation.

3) The amendment attacks home rule autonomy and intrudes into the traditional powers of local governments and political subdivisions with respect to civil rights. Two-thirds of all Coloradans live in home rule cities. Under the Colorado Constitution home rule cities are empowered to address the needs of their residents as they see fit. This amendment also undermines county powers and the ability of the executive branch of government, school districts, and political subdivisions to enact their own anti-discrimination policies on this issue. The amendment implies that governmental entities, including the state, counties, cities, school districts, and other political subdivisions, should not be trusted to decide whether or not to protect persons from discrimination based on sexual orientation.

4) Ensuring the civil rights of any person, whether for age, gender, race, disability, religion, sexual orientation, marital or familial status, does no more than protect persons from discrimination and guarantee their basic human rights. The amendment is misleading and prejudicial by implying that homosexual, lesbian, and bisexual persons are seeking "minority status" or "quota preferences." Instead, the